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No. _____

In The Supreme Court of the United States

VERNON BONNER AND
MARIA MAGANA BONNER, PETITIONERS

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit err in holding, in conflict with eight other circuits and this Court's decision in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), that restitution imposed as part of a criminal sentence under the Mandatory Victims Restitution Act is a "civil penalty"?

2. If the answer to the first Question Presented is "yes," did the Seventh Circuit err in concluding, in conflict with this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2004), that the Sixth Amendment did not entitle petitioners to a jury trial on the amount of restitution?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are petitioners Vernon Bonner and Maria Magana-Bonner, and respondent the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Vernon and Maria Magana Bonner respectfully request that this Court issue a writ of certiorari to review a decision of the U.S. Court of Appeals for the Seventh Circuit.

This case presents the Court with an opportunity to resolve an entrenched circuit conflict on an issue that affects the thousands of federal criminal cases annually in which restitution is part of the sentence: whether an order of restitution imposed as part of a criminal sentence under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A *et seq*, is a civil penalty or a criminal punishment. In conflict with the decisions of eight other federal circuits, this Court's decision in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), and the position of the United States in that case, the Seventh Circuit held that such restitution is a civil penalty. By recharacterizing as "civil" a remedy that this Court has already held is a criminal punishment, the Seventh Circuit's decision circumvents this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Under the principles announced in those cases, MVRA—which requires the district courts to increase a defendant's sentence by the amount of his victim's losses based upon facts not tried to the jury—violates the right to jury trial guaranteed by the Sixth Amendment.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1a – 8a was issued on April 14, 2008, and is reported at 522 F.3d 804. The decision of the district court is unreported. The Seventh Circuit issued other opinions in

this case on March 7, 2006 (App. 9a-16a) and May 20, 2005 (App. 17a-23a).

JURISDICTION

The judgment of the Seventh Circuit was entered on April 14, 2008. This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

This petition involves the Sixth Amendment to the Constitution and the MVRA. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The relevant portions of the MVRA state:

> Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

18 U.S.C. § 3663A (a)(1).

> In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

18 U.S.C. § 3664 (f)(1)(a).

STATEMENT OF THE CASE

This case presents two substantial and recurring questions involving the exercise of core constitutional rights: whether restitution under MVRA is a "civil" or "criminal" penalty; and if such restitution is "criminal," whether the Sixth Amendment permits the government to order criminal defendants to pay such restitution in amounts never proved in a trial by jury. This Court's resolution of these questions would affect a substantial number of the fourteen percent of criminal prosecutions in which the federal government imposes restitution as part of the sentence—thousands of cases annually.[1]

A. Statutory Background

Congress enacted MVRA in 1996 to augment the existing federal regime for imposing restitution in criminal cases, the Victim and Witness Protection Act ("VWPA").[2] Enacted in 1982, VWPA created a new source of post-conviction financial liability. In connection with "sentencing a defendant convicted of an offense under" Title 18, the statute gave district courts discretion to order, "*in addition to* . . . any other penalty authorized by law, that the defendant make restitution to any victim" of his offense. 18 U.S.C. § 3663(a)(1)(A) (emphasis added). When considering whether to order restitution, the court was required to consider both the amount of the victim's loss and the defendant's financial resources, needs, and earning ability. *Id.* § 3663(a)(1)(B)(i).

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[1] U.S. Sentencing Comm'n, Offenders Receiving Fines and Restitution in Each Primary Offense Category for Fiscal Year 2007. Pet. App. 78a.

[2] 18 U.S.C. § 3663.

By enacting MVRA in 1996, Congress created a class of offenses for which restitution was mandatory upon conviction, without regard to the defendant's financial circumstances. 18 U.S.C. § 3663A(a), 18 U.S.C. § 3664(f)(1)(A). The only elements necessary to impose restitution under MVRA are (1) conviction of an enumerated offense, and (2) a determination of the amount of restitution owed. The amount of restitution owed is "the full amount of each victim's losses as determined by the court." *Id.* § 3664(f)(1)(A).

To determine that amount, the court relies upon a presentencing report produced by the defendant's probation officer, which is to include, "to the extent practicable, a complete accounting of the losses to each victim." *Id.* § 3664(a). If the amount of the victim's loss is disputed, the government bears the burden of proving it by "the preponderance of the evidence." *Id.* § 3664(e). The jury plays no role in determining the amount of the penalty: All of the necessary facts are found by the court.

B. Trial and Sentencing

Petitioners Vernon Bonner and his wife Maria Magana-Bonner were accused of unlawfully procuring Social Security disability benefits by falsely representing that they were unable to work due to physical and mental illnesses. Petitioner Maria Bonner was also accused of fraudulently obtaining federal and state higher-education grants. Petitioners were charged with a total of nine counts of wire fraud, four counts of theft of government funds, one count of mail fraud, and one count of theft of educational funds. A jury convicted both petitioners on all counts. Pet. App. 18a.

The district court then referred the action to the probation office for a presentencing investigation and report. Pet. App. 31a. The report applied the federal Sentencing Guidelines, which required that each petitioner's base offense level be increased by "the greater of the actual loss or intended loss" suffered by the victims. FSG § 2B1.1. The report recommended substantial enhancements for both petitioners based upon the actual and intended losses caused by petitioners' conduct. Based in part on its findings with respect to the victims' losses, the report concluded that both petitioners should be sentenced to significant prison terms and ordered to pay more than $450,000 each in MVRA restitution. Pet. App. 35a, 63a.

At the sentencing, the district court adopted the Presentencing Report and sentenced both petitioners to the maximum allowable prison sentence under the Guidelines—78 months for Vernon and 63 months for Maria. The court also ordered Vernon and Maria to make MVRA restitution payments of $462,397 and $487,396, respectively. Pet. App. 3a. It is undisputed that of those amounts, only $4,277 (with respect to Vernon) and $22,731 (with respect to Maria) were proved to the jury.

C. Petitioners' Appeals

In their initial appeal to the Seventh Circuit, petitioners argued that the district court's sentence violated their Sixth Amendment rights under this Court's decision in *Booker*. Pet. App. 23a. The government conceded the existence of *Booker* error, and the Seventh Circuit concluded that the district court committed error when it "increased the defendants' guideline ranges on the basis of its own findings with

respect to the amount of the loss." *Ibid.* The court therefore ordered a limited remand "to determine whether the district court would have sentenced them differently under the [post-*Booker*] advisory guidelines." *Ibid.*

For reasons not relevant here, the district court was unable to carry out the Seventh Circuit's instructions.[3] Petitioners again appealed, and the Seventh Circuit again vacated their sentences and remanded to the district court—this time with instructions to carry out an entirely new sentencing proceeding. Pet. App. 15a. In that proceeding, petitioners argued that under this Court's decisions in *Apprendi*, *Booker*, and *Blakely*, the court could not constitutionally impose restitution in amounts greater than those proved to the jury. The district court rejected that argument, concluding that under Seventh Circuit precedent MVRA was a "civil penalty" and therefore not subject to the Sixth Amendment's protections. Pet. App.3a-4a. Accordingly, the district court again adopted the original presentencing report and resentenced Vernon and Maria to imprisonment of 78 and 63 months, respectively. Correcting an admitted error in the previous calculation of restitution, the court also re-ordered petitioners to pay restitution—this time, in the amount of $434,617.30 for Vernon and $459,616.30 for Maria. Pet. App. 3a.

Petitioners again appealed, arguing that orders of restitution are criminal rather than civil penalties, and that imposing such penalties without supporting jury findings violated the Sixth Amendment.

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[3] For an account of this phase of the proceedings below, see the Seventh Circuit's order of March 7, 2006. Pet. App. 9a-16a

The Seventh Circuit disagreed. It began by acknowledging that under *Apprendi*, "facts underlying *certain* criminal punishments must be proven beyond a reasonable doubt to a jury." Pet. App. 4a (emphasis added). But the court went on to observe that "restitution for harm done is a classic civil remedy that is administered for convenience by the courts that have entered criminal convictions," and that "restitution under the MVRA is not a criminal punishment, *at least not in this circuit.*" Pet. App. 5a (emphasis added).

The court further observed that if it "recharacterize[d] restitution as a criminal penalty," *Apprendi* would not require invaliding the sentences at issue because restitution merely "*constitutes a return to the status quo*" and thus cannot be "*construed as increasing the sentence authorized by a conviction.*" Pet. App. 5a (emphasis in original). The court did not explain, however, why sentence enhancements should be judged against the baseline of the pre-crime "status quo" rather than the baseline of the penalty that would apply in the absence of a judicial finding that a specific amount of restitution is necessary.

The court of appeals remanded the matter to the district court to fix a clerical error, and the district court entered a final amended judgment on June 3, 2008, ordering Vernon Bonner to pay $434,617.30 in restitution, and Maria Magana-Bonner to pay $459,616.30—more than one hundred times the loss attributed to Vernon before the jury, and more than twenty times the amount attributed to Maria. This timely petition followed.

REASONS FOR GRANTING THE PETITION

Beginning with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and extending through *Blakely* and *Booker*, this Court has repeatedly held that the Sixth Amendment right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306; *see also Booker*, 543 U.S. at 243-244. *Apprendi*, *Blakely*, and *Booker* announced a basic principle of Sixth Amendment law—that a defendant must be sentenced "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (emphasis in original). Under this principle, a court may not rely on any "additional findings" to increase punishment beyond the findings made by the jury. *Id.* at 303-304.

The Seventh Circuit's decision violates the core principles of *Apprendi*, *Blakely*, and *Booker*. Under MVRA, the government must impose upon criminal defendants an additional penalty that need not be set forth in the indictment or proved to the jury beyond a reasonable doubt. By taking a penalty that is integral to criminal sentencing and explaining it away as a "classic civil remedy" that is merely "administered for convenience" by the criminal courts, the Seventh Circuit has sidestepped the constitutional inquiry required by the Sixth Amendment: whether the additional penalty imposed by MVRA restitution may be supported by "the jury's verdict alone." *Blakely*, 542 U.S. at 304. Here, it plainly cannot: of the more than $900,000 in restitution ordered by the District Court, only a tiny fraction was proved to the jury.

The Seventh Circuit's attempt to circumvent the Sixth Amendment by redefining criminal restitution

as a "civil penalty" squarely conflicts with the decisions of a substantial majority of its sister circuits. Moreover, the decision below conflicts with the decision of this Court in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), and the position of the United States in that case. The Seventh Circuit's contrary holding is an outlier, and one that imposes substantial negative consequences on criminal defendants in the 10,000 federal cases annually where restitution is part of the sentence. The Court should grant review of the decision below to restore consistency to the law of criminal restitution and reaffirm that the protections of the Sixth Amendment extend to the determination of the amount of restitution.

I. This Court Should Review The Seventh Circuit's Holding That An Order Of Restitution Entered In A Criminal Prosecution Is A "Civil Penalty" Outside The Scope Of The Right To Jury Trial Guaranteed By The Sixth Amendment.

A large majority of the courts of appeals have squarely held that MVRA restitution is a criminal punishment for purposes of the constitutional protections afforded to criminal defendants. By contrast, only one other circuit—the Tenth—agrees with the Seventh Circuit's position that MVRA restitution is a "civil" penalty. This division among the circuits over the classification of MVRA restitution is deeply consequential: the availability of the Sixth Amendment right to jury trial depends upon whether restitution is criminal. This Court should grant review to resolve the troubling inconsistency in the lower courts' approach to MVRA restitution.

A. Eight federal circuits have held, in conflict with the decision below, that MVRA restitution is a criminal punishment.

Eight circuits have rejected the Seventh Circuit's insistence that MVRA restitution is a "civil penalty." Several of these decisions have expressly acknowledged the existence of a circuit conflict on that issue. For example, the Third Circuit, addressing *en banc* the issue presented here, noted that "[o]f the other Courts of Appeals that have addressed this issue, only the Seventh and Tenth Circuits have held that restitution is a civil rather than a criminal penalty." *United States* v. *Leahy*, 438 F.3d 328, 334-335 (3d Cir. 2006) (en banc). As the court in *Leahy* noted, the Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits have taken the contrary position. *Ibid.*

In *Leahy*, the Third Circuit followed "the majority of the circuits that have addressed this issue," concluding "that restitution ordered as part of a criminal sentence is criminal rather than civil in nature," and thus subject to Sixth Amendment scrutiny. *Id.* at 335. Although "restitution combines features of both criminal and civil penalties," the court explained that it was bound by *Pasquantino* v. *United States*, 544 U.S. 349 (2005), and *Kelly* v. *Robinson*, 479 U.S. 36 (1986), to conclude that the criminal aspects of restitution are predominant for purposes of the Sixth Amendment. *Leahy*, 438 F.3d at 333, 335.[4] The *en banc* decision in *Leahy* produced six opinions and strong disagreement on several issues, but not on this one: the conclusion that MVRA restitution is a criminal punishment was unanimous.

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[4] This Court's decisions in *Pasquantino* and *Kelly* are discussed in detail in section I.B, *infra*.

At least three other circuits facing the exact issue presented here have likewise concluded that MVRA restitution is a criminal punishment for purposes of the Sixth Amendment. For example, the First Circuit squarely concluded that "restitution [ordered] as part of a criminal sentence is a criminal penalty, not a civil remedy." *United States* v. *Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006). The Second Circuit has reached the same conclusion, acknowledging other circuits' treatment of MVRA restitution as a "criminal punishment." *United States* v. *Reifler*, 446 F.3d 65, 118-119 (2d Cir. 2006). And the Sixth Circuit has recognized that "restitution constitutes punishment." *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005).

In addition, a substantial majority of circuits has concluded that MVRA restitution is a criminal punishment for purposes of the ex post facto clause of Article I, section 9. For example, in *United States* v. *Edwards*, 162 F.3d 87, 89 (3d Cir. 1998), the Third Circuit surveyed the decisions of its sister circuits and concluded that the majority of courts had "found that the retrospective application of the MVRA violates the Ex Post Facto Clause *because restitution imposed as part of a defendant's sentence is criminal punishment, not a civil sanction.*" (emphasis added). After noting the Seventh Circuit's minority view, the Third Circuit undertook its own analysis of the issue and concluded that "[b]oth the statutory scheme and the legislative history of the MVRA point toward a determination that restitution should be considered a form of [criminal] punishment under the statute." *Id.* at 91.

Like the Third Circuit, the First, Second, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits have all

held that MVRA restitution is a criminal punishment for purposes of the ex post facto clause.[5] In stark contrast, only the Seventh and Tenth Circuits currently hold that orders of restitution are civil punishments in all circumstances. Indeed, even the Seventh Circuit formerly recognized that MVRA restitution was a criminal punishment for ex post facto purposes. As Judge Posner explained in addressing restitution under the VWPA —which is "nearly identical" to restitution under the MVRA, *United States* v. *Randle*, 324 F.3d 550, 555 (7th Cir. 2003)—"[r]estitution indeed is the earliest criminal remedy," *United States* v. *Foun-*

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[5] *See, e.g.*, *United States* v. *Gilberg*, 75 F.3d 15, 21 (1st Cir. 1996) ("Retroactive application of VWPA § 3663(a)(2) would violate the Ex Post Facto Clause . . . [because] an order of restitution is part of the criminal sentence[.]"); *United States* v. *Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) ("[E]ven if the MVRA was in effect when Thompson was convicted, application of the new amendments to this case would be barred by the ex post facto clause of the United States Constitution."); *United States* v. *Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (recognizing that just the Seventh and Tenth Circuits had determined that "restitution orders under the [MVRA] are not punishment for the purpose of Ex Post Facto Clause analysis" but nonetheless finding "no basis for following the minority approach"); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) ("We conclude an order of restitution under the MVRA is punishment for Ex Post Facto Clause purposes."); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998) ("We are persuaded by the analysis adopted in the majority of the circuits on this issue. We believe that the Seventh Circuit's view of restitution . . . inconsistent with this court's position . . . that restitution is a criminal penalty carrying with it characteristics of criminal punishment."); *United States* v. *Rezaq*, 134 F.3d 1121, 1140-41 n.13 (D.C. Cir. 1998) ("Congress recently amended section 3364 in a way that appears to eliminate the requirement that the district court take these factors into account; the Ex Post Facto Clause prohibits the application of this amendment to Rezaq.")

tain, 768 F.2d 790, 800 (7th Cir. 1985). In 1998, however, the Seventh Circuit changed course, concluding that "the restitution authorized by the VWPA is not punitive in nature," but civil. *United States* v. *Newman*, 144 F.3d 531, 540 (7th Cir. 1998).[6]

The only other court of appeals to adopt the Seventh Circuit's current position is the Tenth Circuit. In 1993, that court concluded that a defendant could not be ordered to pay restitution in an amount exceeding the total loss caused by his crime, because "[t]he VWPA's purpose is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses." *United States* v. *Arutunoff*, 1 F.3d 1112, 1121 (10th Cir. 1993). Following the Seventh Circuit's decision in *Newman*, the Tenth Circuit extended the holding of *Arutunoff* to conclude that MVRA was not a "punitive act" for purposes of the ex post facto clause. *United States* v. *Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999); *see also United States* v. *Serawop*, 505 F.3d 1112, 1122-23 (10th Cir. 2007) ("[W]e have recognized that the MVRA does not inflict criminal punishment, and thus

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[6] Accord, *e.g.*, *United States* v. *Sawyer*, 521 F.3d 792, 797 (7th Cir. 2008) ("restitution in a criminal case is fundamentally a civil remedy, administered through the criminal process only for convenience"); *United States* v. *George*, 403 F.3d 470, 473 (7th Cir. 2005) ("[Restitution] is a civil remedy administered for convenience by courts that have entered criminal convictions."); *United States* v. *Seals*, 419 F.3d 600, 610 (7th Cir. 2005) ("This court has ruled that the Sixth Amendment does not apply to restitution because it is a civil remedy[.]"); *United States* v. *Bach*, 172 F.3d 520, 523 (7th Cir. 1999) ("We do not see why this procedural innovation, a welcome streamlining of the cumbersome process of our law, should trigger rights under the ex post facto clause.")

is *not* punitive. . . . We are without power to revisit this precedent, absent en banc review.") (emphasis in original).

In short, eight circuits hold that restitution is a criminal punishment while two circuits treat it as a civil penalty. The conflict among the circuits is irreconcilable, and the difference in treatment carries substantial consequences. The conflict is thus both "deep" and "square," and this Court should grant review to resolve the conflict and return clarity and consistency to the law of criminal restitution.

B. The Seventh Circuit's ruling conflicts with this Court's decisions in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), and *Kelly* v. *Robinson*, 479 U.S. 36 (1986), both of which concluded that orders of restitution in criminal cases are criminal punishments.

The Seventh Circuit's decision also conflicts with recent authority of this Court, which has squarely held that that restitution under MVRA is a criminal punishment, and is inconsistent with the prior position of the United States.

In *Pasquantino* v. *United States*, 544 U.S. 349 (2005), this Court considered an order of restitution under MVRA that required a criminal defendant to return to a foreign government the lost excise taxes that were the fruits of his crime. The defendant argued that the restitution order violated the common law "revenue rule," which prohibits the United States from collecting the tax obligations of foreign nations. The Solicitor General responded that the revenue rule did not apply because MVRA restitution was criminal in nature:

> While victims have certain limited rights in the restitution process, restitution remains a criminal punishment that is imposed as part of the sentence for an offense. As this Court has explained," the Solicitor General continued, "restitution imposed as part of a criminal sentence is a 'penal' sanction despite its additional function to reimburse a victim for loss. *Kelly* v. *Robinson*, 479 U.S. 36, 52 (1986). Seen in that light, restitution is a punishment that fulfills the domestic criminal law's aims, once the United States, as sovereign, has made an independent decision to prosecute.

U.S. Br. 20-21 (No. 03-725).

The Court agreed with the position of the United States and affirmed the restitution order. As the Court recognized, the proceeding that spawned the order was "not a suit that recovers a foreign tax liability, like a suit to enforce a judgment[,] [but rather] *a criminal prosecution* brought by the United States in its sovereign capacity *to punish* domestic criminal conduct." 544 U.S. at 362 (emphasis added). Because "[t]he purpose of awarding restitution [was] not to collect a foreign tax, but to mete out *appropriate criminal punishment* for that conduct[,]" the orders of restitution did not run afoul of the revenue rule. *Id.* at 365, 369 (emphasis added).

Below, the United States dismissed *Pasquantino*'s unequivocal statement that MVRA restitution is a criminal punishment as dictum. The Seventh Circuit agreed, describing the statement as a comment made "in passing." Pet. App. 4a. *Pasquantino*, however, cannot be so lightly dismissed. The Court's classification of restitution as a criminal punishment there is neither dictum nor a "passing" comment, but a cen-

tral element of the holding. The outcome in *Pasquantino* turned on finding that the orders of restitution at issue were criminal punishments. If the MVRA restitution orders had been civil penalties, the orders of restitution would have been prohibited by the revenue rule and not enforceable in U.S. courts. 544 U.S. at 362. Because the classification of restitution as a criminal punishment was necessary to the decision in the case, it is controlling authority on the issue.

Moreover, as the United States' brief in *Pasquantino* confirms, the decision there was the *second* time that this Court had concluded that restitution in criminal cases is primarily intended as criminal punishment. In *Kelly* v. *Robinson*, 479 U.S. 36, 53 (1986), the Court held that restitution imposed as part of a state probationary criminal sentence was not dischargeable in Chapter 7 bankruptcy proceedings. In so ruling, the Court unequivocally held that restitution as part of a criminal sentence was a criminal punishment: "[W]e conclude that restitution orders imposed in such proceedings operate 'for the benefit of' the State. Similarly, they are not assessed 'for . . . compensation' of the victim. *The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.*" *Id.* (emphasis added).[7]

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[7] Indeed, in a footnote to this passage from *Kelly*, the Court observed that "[s]everal lower courts have addressed the constitutionality of the federal Victim and Witness Protection Act," MVRA's predecessor, under which (as with MVRA) "defendants have no right to jury trial as to the amount of restitution, even though the Seventh Amendment would require such a trial if the issue were decided in a civil case." 479 U.S. at 363 n.14. The Court further observed that, as of that date, "[e]very Fed-

The Seventh Circuit rejected petitioners' reading of *Pasquantino* and *Kelly* for no better reason than that it had "rejected it many times" before. Pet. App. 4a. Every other court of appeals to consider the issue has disagreed. As the *en banc* Third Circuit put it in *Leahy*, "*Pasquantino* clearly states that an award of restitution under the MVRA or the VWPA is a 'criminal punishment.'" *Leahy*, 438 F.3d at 334. The decision below all but announced the isolation of its own position, stating that "[r]estitution is not a criminal punishment, *at least not in this circuit*." Pet. App. 5a (emphasis added). The Seventh Circuit has offered no principled reason for continuing to treat orders of restitution imposed in criminal sentences as civil penalties in defiance of *Pasquantino*, and its erroneous position should be addressed by the Court.

C. The question presented by the Seventh Circuit's decision is recurring and important.

The Seventh Circuit's treatment of restitution imposed in criminal sentencing as a "civil penalty" presents a recurring issue of great importance. Under MVRA, orders of restitution in the "full amount of each victim's loss" are mandatory in a broad array of prosecutions involving a measurable loss to a victim.

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eral Court of Appeals that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment." *Ibid.* Now that *Apprendi*, *Blakely*, and *Booker* have confirmed that criminal defendants have a right to a jury finding on any fact that may increase their maximum sentence, the lower courts cannot have it both ways: Either MVRA restitution is criminal, in which case the Sixth Amendment applies, or it is civil, in which case the Seventh Amendment applies.

18 U.S.C. § 3664(f)(1)(A). Accordingly, restitution is ordered in a large number of criminal cases.

In 2007, for example, more than fourteen percent of all federal criminal convictions—some 10,367 cases—included an order of restitution as part of the defendant's sentence. See U.S. Sentencing Comm'n, Offenders Receiving Fines and Restitution in Each Primary Offense Category for Fiscal Year 2007 (Pet. App. 78a).[8] And for a number of federal crimes—such as embezzlement, fraud, and theft—restitution is ordered in a majority of cases. *Id.*

This Court's resolution of the question whether MVRA restitution orders are "civil" would also resolve acknowledged circuit conflicts on issues not directly raised here. For example, a ruling in this case confirming that MVRA restitution is a criminal punishment would also resolve the existing circuit split on the application of the ex post facto clause to any future MVRA or VWPA amendments. See, *e.g.*, *United States* v. *Schulte*, 264 F.3d 656, 661-62 (6th Cir. 2001) (noting that "a majority of federal courts that have considered this issue have held that retroactive application of the MVRA violates the Ex Post Facto Clause" and observing that the "minority approach" had been adopted by only the Seventh and Tenth Circuits). The same is true for an existing circuit split as to whether the rule of abatement *ab initio* applies to MVRA restitution payments imposed against defendants who die during the pendency of their appeal. See, *e.g.*, *United States* v. *Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007) (noting that "there is

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[8] The Sentencing Commission's restitution statistics are available at http://www.ussc.gov/ANNRPT/2007/Table15.pdf (visited July 12, 2008).

a circuit split" on the application of the abatement doctrine).

Quite apart from these circuit splits, however, the decision below warrants review. To the extent that the classification of restitution as "civil" removes MVRA restitution from the ambit of *Apprendi*, *Booker*, and *Blakely*, it implicates a fundamental right. As this Court has repeatedly stated, the Sixth Amendment right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 305-306. Thus, even setting aside the express conflict discussed above, the fact that many lower court rulings deprive substantial numbers of criminal defendants of their Sixth Amendment rights warrants this Court's attention. See, *e.g.*, *Booker*, 543 U.S. at 229 (granting petition "[b]ecause of the importance of the questions presented").

II. If MVRA Restitution Is A Criminal Punishment, This Court's Guidance Is Needed To Confirm That the Sixth Amendment Protections Guaranteed by *Apprendi*, *Booker*, And *Blakely* Extend To All Criminal Punishments.

This Court's guidance is also urgently needed to confirm that where the state imposes the criminal punishment of restitution, the predicate facts necessary to support that punishment must be proved to a jury. *Apprendi* and its progeny require this result; but the court below and certain other courts of appeals have refused to extend the protections of the Sixth Amendment to MVRA restitution on the basis that it is not criminal *enough*.

In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Expanding upon *Apprendi*, the Court in *Blakely* and *Booker* defined "the 'statutory maximum' [as] the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," and not a maximum punishment included in the relevant statute. *Blakely*, 542 U.S. at 303 (emphasis in original); *Booker*, 543 U.S. at 232 (same). Accordingly, any factual determination beyond what was specifically proven to and found by a jury violates the constitutional requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; accord *Blakely*, 542 U.S. at 301; *Booker*, 543 U.S. at 244.

Apprendi and its progeny established a bright-line rule that "every defendant has a *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313. There can be no dispute that the amount of restitution owed to a victim is a "fact" that is legally essential to the imposition of a restitution penalty under the MVRA. It therefore follows that if an order of MVRA restitution is a criminal punishment, the *Apprendi* line of cases applies to such orders. As Judge Bye of the Eighth Circuit has put it: "Once we recognize restitution as being a 'criminal penalty' the proverbial *Apprendi* dominoes begin to fall." *United States* v. *Carruth*, 418 F.3d 900, 906 (8th Cir. 2005) (Bye, J. dissenting).

The court below and certain other circuits, however, have decided otherwise. In doing so, they have relied on two theories. First, they reason that even if MVRA restitution is a criminal punishment, it is not the right *kind* of criminal punishment to trigger Sixth Amendment protection. Second, they hold that MVRA restitution lacks a "statutory maximum"—and thus falls outside the scope of *Apprendi*, *Booker*, and *Blakeley*. Neither of these rationales is consistent with the established authority of this Court, and certiorari is warranted to confirm that *Apprendi*, *Booker*, and *Blakely* apply to preclude any criminal punishment not supported by the jury's verdict.

1. In concluding that MVRA restitution, even if a criminal punishment, does not implicate the Sixth Amendment, the Seventh Circuit invoked the notion that restitution does not "increas[e] the sentence authorized by a conviction" because it merely "constitutes a return to the status quo," such that "a criminal's ill-gotten gains are returned to their rightful owner." Pet. App. 5a. Other circuits have used similar reasoning. For example, the Third Circuit's divided *en banc* decision in *Leahy*, in which a narrow plurality likewise explained that "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses"; thus, "even though [MVRA] restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe." 438 F.3d at 338. Two concurring opinions in *Leahy* offered a different variation on this theme, concluding that "the imposition of restitution did not violate the Sixth Amendment right to a jury trial solely on the conclusion that restitution is not the type of criminal penalty to which the right to a jury trial attaches." *Id.* at 339 (Fisher, J., concurring

in part in the judgment); see also *ibid.* (Sloviter, J., concurring).

The common thread in these opinions is the notion that even when imposed as part of a criminal sentence, restitution is, "in its essence," a compensatory remedy. *Leahy*, 438 F.3d at 338. Thus, all these courts essentially conclude that whether or not MVRA restitution is *formally* a "criminal punishment" theoretically subject to the Sixth Amendment, it is *effectively* a civil penalty, such that its application cannot be said to increase the defendant's "punishment" and trigger the application of *Apprendi*, *Booker*, and *Blakely*.

That conclusion is squarely inconsistent with this Court's jurisprudence. First, this Court has already explained that criminal restitution is "*not* assessed 'for . . . compensation,'" *Kelly*, 479 U.S. at 53 (emphasis added), but "to mete out appropriate criminal punishment" for the underlying offense *Pasquantino*, 544 U.S. at 365. To circumvent the Sixth Amendment on the ground that MVRA restitution is somehow "civil"—in either a *de jure* or a *de facto* sense—is to vitiate this Court's restitution jurisprudence.

Second, the notion that MVRA restitution is imbued with compensatory purposes and therefore "is not the type of criminal penalty to which the right to a jury trial attaches" is not viable under *Booker* and *Blakely*. Nothing in those decisions suggests—as did the court below—that those cases apply only to "*certain* criminal punishments." Pet. App. 4a (emphasis added). As Judge McKee of the Third Circuit wrote in his dissent in *Leahy*—a dissent joined by Judges Becker, Rendell, Ambro, and Smith—this selective approach to the applicability of *Booker* and *Blakely* to

criminal punishments is "inconsistent with the bright-line rule" created by *Apprendi* and its progeny, pursuant to which "'the judge's authority to sentence derives *wholly* from the jury's verdict.'" *Leahy*, 438 F.3d at 340, 342 (McKee, J., concurring in part and dissenting in part) (quoting *Blakely*, 542 U.S. at 305). According to this Court, the purpose of that "bright-line rule" is in part "the need to give intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305. The approach employed by the Seventh Circuit below and the Third Circuit in *Leahy*—under which some criminal punishments are subject to Sixth Amendment protections and others are not—robs the Sixth Amendment of the very "intelligible content" that *Blakely* required. As Judge Smith observed in his *Leahy* dissent, the muddying of the scope of the Sixth Amendment strikes at the heart of the amendment's constitutional purpose: "defining a right to a jury trial with intelligible content is a necessary step in protecting the people's ultimate control over the judiciary, as the Framers of the Sixth Amendment intended." *Leahy*, 438 F.3d at 349 (Smith, J. dissenting in part).

2. Following many of its sister circuits, the Seventh Circuit also observed that orders of MVRA restitution determined and entered by a judge do not offend the Sixth Amendment because MVRA restitution involves no "statutory maximum"—and thus does not entail the kind of judicial factfinding proscribed by *Apprendi*, *Booker*, and *Blakely*. Pet. App. 6a. These circuits reason that under the Sentencing Guidelines (which were the focus of *Blakely*), "a judge determines the appropriate penalty from within a specified range, based on a variety of facts and factors that are not necessarily predetermined by the jury's

finding of guilt." *United States* v. *Milkiewicz*, 470 F.3d 390, 404 (1st Cir. 2006). Under MVRA, by contrast, they reason that "the jury's finding of guilt leads to only one outcome"—an order of restitution in the full amount of the victim's loss. *Id.*

The problem with this view is that it ignores the specific definition of "statutory maximum" set forth in *Blakely* and *Booker*: "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," and not a maximum punishment included in the relevant statute. *Blakely*, 542 U.S. at 303 (emphasis in original); *Booker*, 543 U.S. at 232 (same). Accordingly, any factual determination beyond what was specifically found by a jury—be it the finding of an additional 566 grams of crack cocaine in *Booker*, or the additional instances of wire fraud here—violates the constitutional requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 301 (citing *Apprendi*); *Booker*, 543 U.S. at 244 (same).

This is a critical matter to criminal defendants in more than 10,000 federal cases annually, on which the circuits need guidance from this Court. As the Second Circuit observed in *United States* v. *Dupes*, 513 F.3d 338, 345-346 (2d Cir. 2008), cert denied, 128 S.Ct. 1686 (2008), because "no intervening Supreme Court decision has called our decision in *Reifler* [holding that *Apprendi et al* do not extend to restitution] into doubt, we are without authority to overrule it." The Court should grant *certiorari* to address this important issue.

* * * * *

When the government takes legal action against one of its citizens, whether that action is "civil" or "criminal" has profound consequences under the Constitution. If the action is deemed "civil," the aegis of constitutional protections afforded to criminal defendants is stripped away: no longer is the defendant protected by the Ex Post Facto Clause, the Fifth Amendment's prohibition on double jeopardy, and, most important here, the Sixth Amendment's prohibition on trial without jury.

The Seventh Circuit's view that MVRA restitution is a "civil penalty" deprives criminal defendants of all those protections. That view ignores binding precedent of this Court and conflicts squarely with the decisions of the great majority of federal circuits, most of which have concluded that MVRA restitution is a criminal punishment presumptively subject to the Constitution's criminal protections. This Court should take this opportunity to correct the Seventh Circuit's departure from this Court's jurisprudence, resolve the split among the circuits, and restore to criminal defendants the constitutional and common-law rights of which the Seventh Circuit's position deprives them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

In the United States Court of Appeals Seventh Circuit

Nos. 06-3350, 06-3351

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VERNON BONNER AND
MARIA MAGANA-BONNER,

Defendants-Appellants.

ARGUED SEPT. 18, 2007—DECIDED APRIL 14, 2008.

Before EVANS, WILLIAMS, and SYKES, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* For seventeen years, Vernon Bonner and his wife, Maria Magana-Bonner, lied to the federal government and received Social Security benefits for non-existent medical conditions and non-existent children. During this time, Maria Magana-Bonner also lied to obtain federal and state higher-education grants. On August 1, 2002, a jury convicted both defendants on multiple counts of wire

fraud and theft of government funds, and convicted Maria of mail fraud and theft of educational funds.[1]

The defendants do not challenge their convictions on appeal; rather, they challenge various aspects of restitution payments they are required to make under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A. In particular, the defendants claim that restitution under the MVRA is a criminal punishment and that the facts underlying the restitution amount must be proven beyond a reasonable doubt to a jury. Vernon Bonner also claims the district court improperly calculated his advisory guidelines range by relying on the loss he intended to cause the government rather than the loss actually suffered by the government.

These arguments lack merit. This court has consistently held that restitution under the MVRA is not a criminal punishment and does not need to be proven to a jury. And the district court properly relied on intended loss in calculating Vernon Bonner's advisory guidelines range. Therefore, we affirm the district court's awards of restitution. We also remand both cases so the district court can correct certain clerical errors in the judgments.

I. BACKGROUND

This is the third time these cases are before us. Initially, after the defendants were convicted, the district court imposed terms of imprisonment and added a special condition to the defendants' supervised releases making them ineligible to receive certain federal benefits until they paid restitution.

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[1] For a more complete description of the facts, see *United States v. Bonner*, Nos. 02-4272 & 03-1288 (7th Cir. May 20, 2005) (unpublished).

On appeal, we vacated this special condition and also ordered a limited remand in accordance with the procedures set forth in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), which requires the sentencing judge to determine whether he would have sentenced the defendants differently had the matter been decided after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *See Bonner* (7th Cir. May 20, 2005) (unpublished).

After the original sentencing judge recused himself, the cases were reassigned to the present district judge, who found that he could not make the determination required under *Paladino*, since he was not the one who had previously sentenced the defendants. He merely entered an amended judgment and commitment order for each defendant removing the special conditions that had restricted them from obtaining federal benefits. The defendants then moved for this court to order the district court to carry out the limited remand. We denied that motion, vacated the defendants' sentences, and remanded to the district court for a full resentencing. *United States v. Bonner*, 440 F.3d 414, 415 (7th Cir. 2006).

On July 26, 2006, the district court re-sentenced Vernon to 78 months' imprisonment and ordered restitution of $434,617.30. A week later, the court re-sentenced Maria to 63 months' imprisonment and ordered restitution of $459,616.30.

II. ANALYSIS

A. The defendants are not entitled to a jury trial on facts supporting the restitution order.

The defendants claim that the district court erred by ordering restitution without accounting for various protections set forth in *Apprendi v. New Jersey*, 530

U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). These cases hold that facts underlying certain criminal punishments must be proven beyond a reasonable doubt to a jury. The defendants claim that restitution is in fact a criminal punishment and these protections apply. In making this claim, the defendants rely on *Pasquantino v. United States,* 544 U.S. 349, 365, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005), which mentions in passing, "The purpose of awarding restitution [under the MVRA] in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct." The defendants also point to restitution awards in other contexts in which courts have suggested restitution is a criminal punishment. *See Kelly v. Robinson,* 479 U.S. 36, 46-49, 49 n. 10, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) (describing restitution imposed as part of a state probationary criminal sentence as a "penalty" that could not be discharged in bankruptcy proceedings); *United States v. Fountain,* 768 F.2d 790, 800-01 (7th Cir. 1985) (describing restitution under the federal Victim and Witness Protection Act as a "traditional criminal remedy").

The problem with the defendants' argument is that we have rejected it many times, even after *Pasquantino* was decided. *See, e.g., United States v. LaGrou Distrib. Sys.,* 466 F.3d 585, 593 (7th Cir. 2006) ("We reiterate: restitution is not a penalty for a crime for *Apprendi* purposes since restitution for harm done is a classic civil remedy that is administered for convenience by the courts that have entered criminal convictions." (internal quotation

marks omitted)); *United States v. Seals*, 419 F.3d 600, 610 (7th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005). Restitution under the MVRA is not a criminal punishment, at least not in this circuit. *But see, e.g., United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006) ("[C]onsistent with the view of the majority of the Circuits to have addressed this issue, [we reaffirm] that restitution ordered as part of a criminal sentence is criminal rather than civil in nature.").

Moreover, even if we were to reconsider our previous decisions and recharacterize restitution as a criminal punishment, *Apprendi* and its progeny would not require us to invalidate the defendants' sentences. For example, the Third Circuit, which recognizes that restitution under the MVRA is a criminal penalty, has held:

> [E]ven though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged. Rather, restitution constitutes a return to the status quo, a fiscal realignment whereby a criminal's ill-gotten gains are returned to their rightful owner. In these circumstances, we do not believe that ordering a convicted defendant to return ill-gotten gains should be construed as increasing the sentence authorized by a conviction pursuant to *Booker*.

Id. at 338 (emphases added); *see also United States v. Milkiewicz*, 470 F.3d 390, 404 (1st Cir. 2006) ("Post-conviction judicial fact-finding to determine [the] amount [of restitution] by no means imposes a

punishment beyond that authorized by jury-found or admitted facts, or beyond the statutory maximum as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." (internal quotation marks and alteration omitted)); *United States v. Belk*, 435 F.3d 817, 819 (7th Cir. 2006) ("[The defendant's] protest about the amount of restitution likewise fails to the extent it rests on *Booker*, for restitution lacks a 'statutory maximum' and the whole *Apprendi* framework (of which *Booker* is an instance) therefore is inapplicable.").

Alternatively, the defendants suggest that if restitution is a civil remedy, then the Seventh Amendment guarantees them a jury trial. The defendants muster no support for this claim. Perhaps that is because we have already implicitly rejected this argument. *See United States v. Scott*, 405 F.3d 615, 619 (7th Cir.2005) ("[T]he amount of criminal restitution is determined by the judge, whereas a suit for damages is a suit at law within the [Seventh] [A]mendment's meaning."); *see also Kelly*, 479 U.S. at 53 n. 14, 107 S.Ct. 353 (noting the uniformity among lower courts in finding the Seventh Amendment inapplicable to restitution orders in the context of the federal Victim and Witness Protection Act).

B. The district court properly calculated the restitution amounts and guideline ranges.

Next, the defendants argue that the amount of restitution must be limited to the amount of loss that was proven to the jury beyond a reasonable doubt. This argument rests solely on the assumption that *Booker* applies to restitution claims. Because the defendants' assumption is wrong, this argument has no traction. Moreover, the restitution ordered here tracks the amount the defendants swindled from the

state and federal governments. The record indicates that the defendants stole a total of $434,617.30 from the Social Security Administration; they face joint and several liability for restitution on that amount. Additionally, Maria Bonner defrauded the U.S. Department of Education and the State of Illinois of $24,999.00 in educational grants; only she must pay restitution for that money. These amounts precisely match the restitution ordered by the district court.

Additionally, Vernon Bonner claims the district court erred in considering intended loss when determining his applicable guidelines range. But that was precisely the kind of loss the district court was supposed to consider. *See United States v. Wallace*, 458 F.3d 606, 612 (7th Cir. 2006), *vacated on other grounds*, --- U.S. ----, 128 S.Ct. 856, 169 L.Ed.2d 708 (2008) (noting that the court was "troubled by the fact that the judge said that she thought that culpability should be measured by actual loss rather than intended loss. This was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts."); U.S. Sentencing Guidelines Manual § 2B1.1. cmt. n. 3(A) (2006) (noting that the applicable loss is generally "the greater of actual loss or intended loss").

C. Clerical errors in the judgments require remand.

Finally, the defendants point out that the district court's written judgments still prohibit the defendants from obtaining any federal benefits until they have completed their restitution payments, even though the district court did not mention this requirement when pronouncing judgment at the sentencing hearings. The government agrees that the district court erred by including these conditions in

the written judgments, but claims these were merely clerical errors. The defendants do not dispute this characterization.

We agree that these errors were likely clerical in nature, as we had issued a previous order prohibiting the district court from imposing such conditions on the defendants. *See Bonner* (7th Cir. May 20, 2005) (unpublished). Moreover, "[i]f an inconsistency exists between an oral and the later written sentence, the sentence pronounced from the bench controls." *United States v. Becker,* 36 F.3d 708, 710 (7th Cir. 1994). So these conditions should be removed from the written judgments.

It is conceivable that we could correct these clerical errors on our own, without remanding to the district court. *See* Fed. R. Crim. P. 1(a)(1) (noting that these rules govern all criminal proceedings in both federal district courts and courts of appeals) and Fed. R. Crim. P. 36 ("[T]he court may at any time correct a clerical error in a judgment ...."); *see also United States v. Boyd,* 208 F.3d 638, 649 (7th Cir. 2000), *vacated on other grounds,* 531 U.S. 1135, 121 S.Ct. 1072, 148 L.Ed.2d 949 (2001) (correcting a clerical error without remand). But we generally have asked district courts to make such corrections themselves on a limited remand. *See, e.g., United States v. Bullock,* 857 F.2d 367, 372-73 (7th Cir. 1988); *United States v. Thomas,* 774 F.2d 807, 814 (7th Cir. 1985). Accordingly, we do the same here.

III. CONCLUSION

The judgments are AFFIRMED, but the cases are REMANDED solely for the district court to correct the above-specified clerical errors in the judgments.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-4272, 03-1288.
UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
VERNON BONNER AND MARIA MAGANA BONNER,
DEFENDANTS-APPELLANTS.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 CR 670—**George W. Lindberg**, *Judge*

Submitted Feb. 6, 2006—Decided March 7, 2006 [1]

Before BAUER, COFFEY, and MANION, Circuit Judges.

COFFEY, *Circuit Judge*. The appellants, Vernon and Maria Magana Bonner, have filed a motion asking this court to provide direction to the district court on a matter of first impression in this circuit. We previously directed a limited remand pursuant to the terms set forth in *United States v. Paladino*, 401

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge favored hearing the case en banc. Chief Judge Flaum took no part in the consideration of whether to hear the case en banc.

F.3d 471 (7th Cir.2005), for the district court to state whether it would have imposed the same sentences had it understood in this case that the guidelines were advisory. On remand, the original sentencing judge recused himself, and the case was reassigned to another district court judge. The newly assigned judge after review issued an order explaining that he cannot proceed because he was not the sentencing judge and thus is unable to carry out the purpose of the limited remand. The appellants in turn ask this court to reverse the district court's ruling and order the newly assigned judge to carry out the limited remand in light of the sentencing judge's recusal from the case. Rather than directing the newly assigned judge to follow the procedure set forth in *Paladino,* we believe the better approach would be to vacate the appellants' sentences and remand to the newly assigned district judge with a clean slate for resentencing. This approach both makes sense and is true to the spirit of *Paladino* and its progeny.

I. Background

We recite only those facts necessary for this opinion but point out that a more complete recitation of the underlying facts may be found in our previous unpublished order. *See United States v. Bonner,* Nos. 02-4272 & 03-1288 (7th Cir. May 20, 2005) (unpublished). Vernon and Maria Magana Bonner were found guilty of wire fraud and theft of government funds. Maria also was found guilty of mail fraud and theft of educational funds. The district court sentenced both Vernon and Maria to 78 months' imprisonment, ordered them to pay restitution, barred Vernon from receiving any future social security benefits until restitution had been paid in full, and barred Maria from receiving any

federal benefits until restitution was paid. In our May 20, 2005, order, we vacated the restriction on their eligibility for benefits and remanded the case to the district court for the entry of corrected judgments. We also directed a limited remand pursuant to *Paladino,* asking the district court to indicate whether it would have sentenced the appellants differently under the advisory guidelines. *Id.*

The first sentencing judge, Judge Hart, recused himself from further proceedings on remand and recommended to the Executive Committee for the United States District Court for the Northern District of Illinois that the case be reassigned to another judge. Upon reassignment, Judge Lindberg issued a minute order explaining that it appears "that only the sentencing judge can make the determination required by *Paladino,* and *Paladino* provides no course of action for a situation such as this." He thus concluded that he was unable to carry out the purpose of the limited remand and refused to proceed. In denying the appellants' motion to reconsider, Judge Lindberg again relied on the language in *Paladino* referring to the "sentencing judge," and he explained that whether he may conduct proceedings on remand is an issue for this appellate court, not him, to decide.

II. Discussion

Our review of the Bonners' sentences imposed prior to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), is for plain error only because they did not object based on Sixth Amendment or *Apprendi* grounds in the district court. *See Paladino,* 401 F.3d at 481. In *Paladino,* our court outlined the

procedure for determining whether an error, such as a sentence imposed under a guidelines regime that was thought to be mandatory, constitutes a correctable plain error. *Id.* at 481-83. We went on to explain that even where plain error exists, such an error is not correctable without proof that intolerable prejudice or a "miscarriage of justice" has occurred. *Id.* at 481. In order to determine whether such prejudice exists, we are required to ascertain whether the "*sentencing judge* would have given the sentence he did even if he had not misunderstood the legal effect of the guidelines." *Id.* at 482 (emphasis added). Accordingly, this court agreed on a procedure whereby the court would order "a limited remand to permit the *sentencing judge* to determine whether *he* would (if required to resentence) reimpose his original sentence." *Id.* at 484 (emphasis added).

This, by its very nature, is a subjective determination. Indeed, in *Paladino* we stated that the case should be remanded to the "sentencing judge," not just any judge who might be available. *Cf.* Fed. R. Crim. P. 25(b)(1); *United States v. Soto,* 48 F.3d 1415 (7th Cir.1995). We therefore conclude that, according to *Paladino,* the only person who could really tell us whether he would have imposed the same sentence based on the facts and evidence of a particular case is the original "sentencing judge." In his dissent to rehearing en banc in *Paladino,* Judge Ripple acknowledged the subjective requirements of a *Paladino* remand when he voiced concern over the uncertainty that would result in cases where "retirement, disability or death has made impossible consultation with the district judge who imposed the unconstitutional sentence." *Paladino,* 401 F.3d at 487 (Ripple, J., dissenting). The fact is that, in order for

an appellate court to determine that a "miscarriage of justice" has not occurred, *Paladino* makes clear that an appellate court must be confident that the sentencing judge would have given the same sentence. *Id.* at 482. We fail to see how this court could possibly be "confident" that the sentencing judge would have given the same sentences in this case unless he has reassured himself after a further proceeding and we are able to ask him.

The Second and the Ninth Circuit have addressed this issue and reached similar conclusions, although they employ slightly different remand procedures. *See United States v. Sanders,* 421 F.3d 1044 (9th Cir.2005); *United States v. Garcia,* 413 F.3d 201 (2d Cir.2005). Similar to the decision we reach today, the Ninth Circuit held that a full remand for a resentencing hearing, rather than its standard limited remand, was appropriate in a case where the district court judge had retired while the case was on appeal. *Sanders,* 421 F.3d at 1052. The Second Circuit, in contrast, concluded that a successor judge may conduct proceedings on limited remand when the original sentencing judge was unavailable, reasoning that the district court as an institution, not an individual judge, analyzes whether a defendant's sentence would have been the same under an advisory guidelines system. *Garcia,* 413 F.3d at 226. When the original sentencing judge is unavailable, however, the Second Circuit requires the presence of the defendant and requires the successor judge to consider what sentence he or she would have imposed on behalf of the court post-*Booker* rather than try to speculate what the original sentencing judge would do. *Id.* at 228-30; *cf.* Fed. R. Crim. P. 43(b)(3). These qualifications led the Ninth Circuit to observe that

there is no substantive difference between the procedures adopted by the two circuits. "Whether the new district judge is imposing a new sentence in a full resentencing hearing, or determining in a *Garcia* modified limited remand whether he or she would have imposed a materially different sentence than that imposed by the original judge, a full review of the record is required. Further, in both cases the defendant must be produced and given an opportunity to be heard." *Sanders*, 421 F.3d at 1052.

Vacating the appellants' sentences and remanding for a new sentencing hearing allows the newly assigned judge to proceed with a clean slate. Unlike the typical case contemplated in *Paladino*, we cannot simply ask the sentencing judge whether he would have given a different sentence and "thus dispel[ ] the epistemic fog." *Paladino*, 401 F.3d at 484. Accordingly, we see no purpose in restricting a newly assigned judge to comparing the sentence he would impose post-*Booker*, armed with the knowledge that the guidelines are advisory, to the sentence initially imposed by a different judge operating under the assumption that the guidelines were mandatory. Instead of being constrained by the proceedings conducted before the original sentencing judge, the successor sentencing judge will now be able to consider the entire record, consider additional evidence, including witness testimony, hear from the defendant if he or she desires, and hear arguments from the defense and prosecution alike. "In the post-*Booker* world, sentencing judges have discretion to weigh a multitude of factors that were not ordinarily relevant or appropriate to consider under the previous regime." 401 F.3d at 487-88 (Kanne, J., dissenting) (citing the example of specific offender

characteristics set forth U.S.S.G. § 5H1 such as age, family ties and responsibilities, and employment record). Also, unlike a limited *Paladino* remand, the defendant will have an absolute right to be present during the hearing. *See* Fed. R. Crim. P. 43(a)(3). The new sentencing judge will start with a blank page and there is nothing to preclude him from imposing the same sentence, a lighter sentence or a harsher sentence as long as the sentence imposed is reasonable and the 18 U.S.C. § 3553(a) factors are considered. *See, e.g., United States v. Newsom,* 428 F.3d 685, 686-87 (7th Cir.2005), cert. denied, 546 U.S. 1224, 126 S.Ct. 1455, 164 L.Ed.2d 151 (2006); *Paladino,* 401 F.3d at 484.

The procedure we establish today is applicable whenever the original sentencing judge is unavailable to carry out a remand from this court in accordance with the terms set forth in *Paladino,* regardless of whether the judge is unavailable due to recusal, retirement, absence, death, sickness or other disability. If the sentencing judge becomes unavailable following a limited remand under *Paladino,* the successor judge should notify this court of the unavailability of the original sentencing judge. This court, in these unusual and rare circumstances, will then vacate the defendant's sentence and remand for a complete resentencing hearing in order to permit the successor judge to sentence the defendant in conformity with the mandates of *Booker.*

Accordingly, IT ISORDERED that the appellants' motion to direct the district court to carry out a limited remand under *Paladino* is DENIED. The appellants' sentences are VACATED, and their cases are REMANDED to the district court for resentencing.

A true Copy:
Teste: /s/

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 19, 2005*
Decided May 20, 2005

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

Nos. 02-4272 & 03-1288

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
v.	No. 01 CR 670
VERNON BONNER and MARIA MAGANA BONNER, *Defendants-Appellants.*	William T. Hart, *Judge.*

* After an examination of the briefs and records, we have concluded that oral argument is unnecessary. Thus, these appeals are submitted on the briefs and records. *See* Fed. R. App. P. 34(a)(2).

ORDER

For 17 years Vernon and Maria Magana Bonner procured Social Security Disability benefits by falsely representing that they were unable to work due to physical and mental illnesses and that they had children to support. Maria also fraudulently obtained federal and state higher-education grants. She was charged with five counts of wire fraud, 18 U.S.C. § 1343; two counts of theft of government funds, *id.* § 641; one count of mail fraud, *id.* § 1341; and one count of theft of educational funds, 20 U.S.C. § 1097(a). Vernon was charged with four counts of wire fraud and two counts of theft of government funds. A jury found both defendants guilty on all counts.

At sentencing the district court determined that Vernon's base offense level was six. *See* U.S.S.G. § 2B1.1(a)(2). The court then added 14 levels under U.S.S.G. § 2B1.1(b)(1)(H) based on the amount of the loss, two levels under § 2B1.1(b)(8)(C) because the offense was committed by "sophisticated means," and two levels under U.S.S.G. § 3C1.1 for obstruction of justice. The court calculated a guideline range of 60 to 78 months based on Vernon's criminal history category of III, sentenced him to a total of 78 months' imprisonment, and ordered him to pay $462,397 in restitution. Maria, with a criminal history category of I, was sentenced to a total of 78 months as well, and was ordered to pay $487,396 in restitution. Her total offense level was two levels higher than Vernon's on account of the stolen educational funds. In its oral pronouncement, the district court also ordered that Vernon would be "barred" from receiving "any Social Security payments in the future" until restitution had been paid in full. The court imposed a similar

restriction on Maria, stating that she would be "ineligible to receive any form of compensation from Social Security or any other government program prior to the time total restitution has been accomplished." For both defendants, however, the written judgments characterize the restriction on receiving future benefits as a special condition of supervised release; both written judgments also define the restriction to include "all federal benefits," not just Social Security benefits. The Bonners appeal, challenging the restriction on future government benefits, and their terms of imprisonment under *United States v. Booker*, 125 S. Ct. 738 (2005).

The government (and possibly the defendants) characterizes the restriction on eligibility for benefits as a special condition of supervised release and concedes that it was an abuse of discretion. However, we do not agree that the restriction is best viewed in that light. When there is a discrepancy in the oral pronouncement and the written judgment, the oral pronouncement prevails.[1] *United States v. Agostino*, 132 F.3d 1183, 1200 (7th Cir. 1997). In this case, the district court did not tie the restriction on Social Security benefits to supervised release in its oral pronouncement. As to both defendants, the court expressed an intention to bar them from ever receiving benefits unless restitution had been paid in full. It is only in the written judgments that the restriction is first connected to supervised release; the restriction was typed in the area of the form

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[1] This is also why both parties correctly point out that as to Vernon Bonner the restriction must be construed to apply only to Social Security benefits, not all federal benefits. But this is of no import because we have decided that the restriction in either form cannot stand.

labeled "Additional Supervised Release Terms." But even then, nothing about the language suggests that the restriction was intended to be limited to the period of supervision.

The district court lacked the authority to limit the defendants' eligibility for Social Security benefits as part of their sentences. A district court may not impose a sentence that is not authorized by statute. *United States v. Morris*, 259 F.3d 894, 900 (7th Cir. 2001); *United States v. Sotelo*, 94 F.3d 1037, 1040 (7th Cir. 1996). District courts are authorized to sentence defendants convicted of federal crimes to probation, fines, and imprisonment. 18 U.S.C. § 3551(b). With respect to the crimes at issue in this case, we are aware of no statutory authority (and the government concedes there is none) for a district court to order an outright bar on eligibility for federal benefits as part of a criminal sentence. Congress has seen fit to restrict the availability of federal benefits for those convicted of specified drug crimes, 21 U.S.C. § 862, but even then Social Security benefits are expressly exempted from the statute's coverage, *id.* § 862 (d)(1)(B). Here the court's restriction on the defendants' eligibility is essentially an order directing the Social Security Administration and other federal agencies not to pay benefits, but in the context of a criminal sentence the court lacks the authority to order an executive agency not party to the action to do (or not do) anything.

Moreover, even if the restriction is properly viewed as condition of supervised release, the government concedes that it cannot stand because its duration exceeds the period of supervised release, *see United States v. Smith*, 332 F.3d 455, 462 (7th Cir.

2003), and the district court lacked the authority to impose it. We agree. Section 3563(a) of Title 18 and U.S.S.G. § 5D1.3 set forth the mandatory conditions of supervised release. Other routine conditions, to be imposed at the discretion of the court, are set forth in § 3563(b). Beyond these, a district court may fashion other conditions appropriate to the particular case so long as they are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. U.S.S.G. § 5D1.3(b)(1); *United States v. Angle*, 234 F.3d 326, 346 (7th Cir. 2000). The conditions must involve no greater deprivation of liberty than is reasonably necessary to achieve these goals. U.S.S.G. § 5D1.3(b)(2); *United States v. Holm*, 326 F.3d 872, 876 (7th Cir. 2003).

As the government concedes, the restriction imposed in this case is not narrowly tailored to the goals outlined above. *See Holm*, 326 F.3d at 879; *United States v. Monteiro*, 270 F.3d 465, 472-73 (7th Cir. 2001). At Maria's sentencing the district court offered no explanation for the limitation, and at Vernon's sentencing stated only that "[t]his is a case in which the defendant has received enormous sums of money through fraudulent action and this is a proper restraint." *See United States v. Scott*, 316 F.3d 733, 735 (7th Cir. 2003) ("The judge did not explain how the . . . condition could be thought to entail 'no greater deprivation of liberty than is reasonably

necessary.'"). And here the court's restriction is redundant with the statutory scheme already in place. The Social Security Act and its implementing regulations govern eligibility for benefits. The Social Security Administration can, and must, recover benefits wrongfully paid and withhold benefits from those who cause an overpayment by intentionally false representations. *See* 20 C.F.R.§ 404.502(a), (c). The end sought by the district court is already provided for by statute, and thus is not tailored to achieve the goals of deterrence or protecting the public. Additionally, a special condition of this sort appears sufficiently "unusual" or "unexpected" as to have required advance notice to the defendants so that they could have adequate opportunity to oppose the condition or suggest a more tailored option. *See Scott*, 316 F.3d at 736; *Angle*, 234 F.3d at 347. We see nothing in the record to suggest that the this sweeping restriction was considered prior to sentencing in open court.

Still, having already conceded that "the district court lacked the authority to impose the conditions of supervised release described in this motion," the government nonetheless urges us to remand the case to the district court so that it may craft a more narrowly tailored condition. Again, we do not agree that the district court imposed this restriction as a condition of supervised release, but even if it had, this is not a case where the condition was merely overbroad and could be cured by narrow tailoring. *See, e.g., Holm*, 326 F.3d at 879. Given the court's lack of authority to impose this restriction, we decline the government's invitation to direct the court to revisit the matter. As we have said, the aim the

sentencing court hoped to achieve is already in place through the Social Security regulations.

We move on to the defendants' *Booker* argument, which we review for plain error because they did not object based on Sixth Amendment or *Apprendi* grounds in the district court. *See United States v. Paladino*, 401 F.3d 471, 481 (7th Cir. 2005). The government concedes that "this case involved constitutional error under *Booker*," and it is clear that the district court, under a mandatory guidelines system, increased the defendants' guideline ranges on the basis of its own findings with respect to the amount of the loss, the use of sophisticated means, and obstruction of justice. *See Booker*, 125 S. Ct. at 756. The effect of this error is unclear, and as is well-established by now, the defendants are therefore entitled to a limited remand to determine whether the district court would have sentenced them differently under the advisory guidelines. *Paladino*, 401 F.3d at 484; *see United States v. Della Rose*, 403 F.3d 891, 907 (7th Cir. 2005) (ordering limited remand of sentence at top end of guideline range).

For the reasons stated above, in both appeals we VACATE the restriction on eligibility for benefits and REMAND to the district court for entry of corrected judgments. We also direct a LIMITED REMAND in each appeal under the procedures outlined in *Paladino*.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
	)	PRESENTENCING
	)	REPORT
vs.	)	
	)	Docket No. 01 CR 670-2
Vernon Ralph Bonner	)	

Prepared For: The Honorable William T. Hart
United States District Court Judge

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Sentence Date: December 4, 2002; at 11:30 a.m.

Offense:	Cts. One through Four: Wire Fraud 18 U.S.C. §1343 & 2-5 Years Imprisonment/$250,000 Fine Cts. Five and Six: Embezzlement of United States Money 18 U.S.C. §641 & 2-10 Years Imprisonment/$250,000 Fine
Release Status:	Detained at the Chicago, Illinois, Metropolitan Correctional Center since August 15, 2001
Detainers:	None
Codefendants:	MAGANA-BONNER, Maria 01 CR 670-1: Found guilty of Counts 1-9 of the indictment on August 1, 2002. Sentencing is scheduled for December 4, 2002, before the Honorable William T. Hart.
Date Report Prepared:	October 18, 2002
Date Report Revised:	
Related Cases:	None

Identifying Data:

Date/Place of Birth:	4/1/50: Saint Louis, Missouri
Age:	52
Race:	Black
Sex:	Male
SSN No:	***-**-4788
FBI No:	264284M11
USM No:	06300-027
Other ID No:	CPD IR #: 387605 S.I.D.: IL 18508300
Education:	Associate's Degree
Marital Status:	Married
Dependents:	One (Wife)
Citizenship:	United States Native-born
Legal Address:	5072 Carolina Gary, Indiana 46409
Aliases:	None
Alias SSN:	None

PART A. THE OFFENSE

Charge(s) and Conviction(s)

On July 25, 2002, a nine-count indictment was filed in the Northern District of Illinois, charging Vernon Ralph Bonner, defendant herein, with violations of 18 U.S.C. §1343 641 and 2. Counts One through Four charged that from in or about 1984 and continuing through the present, the defendant and Codefendant Maria Magana-Bonner ("Magana-Bonner") knowingly devised and intended to devise a scheme to defraud the Social Security Administration ("SSA") and to obtain money and property, namely, monthly federal social security disability benefits and other social security benefits in the total amount of approximately $400,000, by means of materially false and fraudulent pretenses, representations, and promises.

It was a part of the scheme that the defendant and Codefendant Magana-Bonner feigned and exaggerated various symptoms of mental and physical illness and disease, thereby causing doctors and other health care providers to conclude that the defendants were unable to perform substantial gainful activity due to their alleged debilitating mental and physical illness and disease, when in truth and in fact, as the defendant and Codefendant Magana-Bonner both knew that they were not so disabled.

It was further a part of the scheme that in addition to causing the production of false and misleading medical reports, records and opinions the defendant and Codefendant Magana-Bonner, on their own behalf and while aiding each other, made numerous material misrepresentations to SSA in their

applications for disability benefits, continuing disability review proceedings and disability hearings by falsely claiming to suffer from severe physical and mental illnesses and impairments that supposedly precluded them from engaging in basic daily life activities, such as driving, caring for one's self and performing common household chores.

It was further a part of the scheme that through their fraudulently obtained medical reports and material misrepresentations, the defendant and Codefendant Magana-Bonner applied for, and then continued to receive, monthly federal disability social security benefits to which both defendants knew that they were not otherwise entitled.

It was further a part of the scheme that in or around 1992, the defendant and Codefendant Magana-Bonner applied to receive social security benefits on behalf of two fictitious minor dependent children, namely Diego Magana and Virginia Bonner. In so doing, the defendant and Codefendant Magana-Bonner materially misrepresented to SSA that each child had been born to one of the defendants in a foreign country.

It was further a part of the scheme that the defendant and Codefendant Magana-Bonner caused monthly social security benefits from themselves and their fictitious children to be directly deposited into bank accounts that were at all times maintained and controlled by the defendants. Counts one through four charged that on different dates for the purpose of executing the aforementioned scheme, the defendant and Codefendant Magana-Bonner knowingly caused to be transmitted in interstate commerce from Philadelphia, Pennsylvania, to Chicago, Illinois, by

means of wire and radio communication, certain signs, signals and sounds, namely wire transfers from Financial Management Service, Department of the Treasury to a bank account maintained by either the defendant, Codefendant Magana-Bonner or both. All of the above were in violation of Title 18, United States Code, Sections 1343 and 2.

Counts Five and Six charged that on different dates, the defendant and Codefendant Magana-Bonner embezzled money of the United States, administered by the United States Social Security Administration through its federal disability program. The defendant and Codefendant Magana-Bonner were not entitled to the aforementioned funds. The aforementioned acts specified in Counts five and six were in violation of Title 18, United States Code, Sections 641 and 2.

Count Seven charged that from in or about January 1993 through in or about May 1997, Codefendant Magana-Bonner knowingly devised a scheme to defraud Chicago State University and the United States Department of Education and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises.

It was a part of the scheme that in connection with her applications for financial aid, Codefendant Magana-Bonner knowingly and materially misrepresented on financial aid documents her individual and household income of the years 1991 through 1995 by failing to disclose any of the social security benefits that were received by Codefendant Magana-Bonner and the defendant and two fictitious children created to collect social security benefits. Codefendant Magana-Bonner concealed her false statements by using a social security number

registered to another individual. On or about August 3, 1996, Codefendant Magana-Bonner for the purposes of executing the above-described scheme did knowingly cause in an authorized depository for mail matter, an envelope containing a Financial Aid Authorization form; in violation of Title 18, United States Code, Section 1341.

Count Eight charged Codefendant Magana-Bonner with knowingly causing a wire transfer in furtherance of the fraudulent scheme in Count seven of the indictment; in violation of Title 18, United States Code, Section 1343.

Count nine charged Codefendant Magana-Bonner with willfully obtain and attempting to obtain by fraud and material false statements funds provided under Title 20, chapter 28, Subchapter IV, United States code; in violation of Title 20, United States Code, Section 1097(a).

The defendant was extradited from Waseca, Minnesota, where he was serving a sentence for Case 00 CR 55, to the Chicago, Illinois, Metropolitan Correctional Center pending prosecution for the instant offense. On August 16, 2001, the defendant appeared before the Honorable Robert W. Gettleman for an arraignment and entered a plea of not guilty as charged in the indictment. On September 13, 2001, the defendant filed a motion to determine his mental competency.

On September 19, 2001, the defendant's motion to determine mental competency was granted. On December 14, 2001, the defendant was transported to Isaac Ray Center, located in Chicago, Illinois, for a psychiatric evaluation. On February 13, 2001, a jury

trial was scheduled for May 6, 2002, The trial date was subsequently rescheduled for July 23, 2002.

On March 20, 2002, the court found the defendant competent to stand trial based on the psychiatric evaluation from the Issac [sic] Center. The jury trial commenced on July 23, 2002 and concluded on August 1, 2002,. On the latter date, the jury found the defendant guilty of Counts One through Six of the indictment.

The court entered a judgment of guilty, and the cause was referred to the probation office for a presentence investigation and report. Sentencing was scheduled for November 13, 2002 at 11:30 a.m. On September 25, 2002, the sentencing date was rescheduled for December 4, 2002 at 11:30 a.m.

The Offense Conduct

Information contained in this section was gathered from Assistant United States Attorney Stuart Chanen who submitted the attached government's version of the offense and plea agreement on October 1, 2002. Upon the advice of counsel, the defendant declined to discuss his involvement in the instant offense during presentence interviews, and to date, a written defendant's version has not been received by the probation office.

An interview was conducted with FBI Special Agent Ron Carver on October 10, 2002. Special Agent Carver corroborated the facts as contained in the government's version of the offense. He stated that the investigation commenced following the defendant's indictment in Gary, Indiana, for theft of a government check. Special Agents learned that the defendant and Codefendant Magana-Bonner were both receiving Social Security Benefits for similar

mental and physical ailments. In addition, during the investigation for the instant offense, it was determined that Codefendant Magana-Bonner was fraudulently receiving education funds in addition to social security benefits.

After reviewing all of the information presented by the aforementioned parties, the undersigned concurs with the factual summary of events as presented.

Victim impact

Assistant United States Attorney Stuart Chanen submitted the government's version of the offense on October 1, 2002, in which he included a statement regarding the victim impact in this case. He stated that the direct victim of the instant offense is the Social Security Administration. The SSA was defrauded and is owed in excess of $400,000.

Additional victims of the instant offense are people with disabilities who might have been eligible for benefits and other students who would have been eligible for grants. Due to the defendant and Codefendant Magana-Bonner's fraud, monies that would have been allocated to the appropriate individuals were no longer available.

Indirectly, the reputations of the aforementioned state and federal agencies were harmed by the defendant's conduct. The defendant's crimes have the broader consequence of eroding confidence in the social security and governmental financial aid systems.

Adjustment for Obstruction of Justice

U.S.S.G. §3C1.1 states that if the defendant willfully obstructed or impeded, or attempted to obstruct the administration of justice during the course of the

investigation, prosecution, or sentencing of the instant offense of conviction increase the offense level by two levels. Application Note four sets forth examples of the types of conduct to which this adjustment is intended to apply. Providing materially false information to a judge or magistrate is one of the examples which would warrant an enhancement under U.S.S.G. §3C1.1.

The defendant feigned that he was incompetent to stand trial in the instant offense. On September 13, 2001, the court granted a motion to have him undergo a psychiatric evaluation at the Isaac Ray Center, located in Chicago, Illinois. Following a lengthy evaluation which delayed the trial and at great expense to the government, the Isaac Ray Center concluded that the defendant was malingering mental illness for the purpose of avoiding his trial in the instant offense. Due to the defendant's false statements to the court regarding his mental illness, the defendant obstructed justice.

Adjustment for Acceptance of Responsibility

The defendant put the government to its burden of proof by pleading not guilty and going to trial. He declined to discuss his offense conduct with the undersigned and has not submitted a typewritten version. Therefore, he does meet the criteria set forth in U.S.S.G. §3C1.1, for acceptance of responsibility. In addition, according to U.S.S.G. §3C1.1, conduct resulting in an enhancement under U.S.S.G. §3C1.1 ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.

Offense Level Computations

The 2001 edition of the Guidelines Manual has been used in this case.

Counts One through Four -- Wire Fraud

Counts Five and Six -- Embezzlement of United States Money

Pursuant to U.S,S.G. §3D1.2(d), Counts One through Six can be grouped together because the offense is determined largely on the basis of the total amount of harm or loss and because the offense behavior was ongoing or continuous in nature.

Base Offense Level: The United States Sentencing Commission Guideline for violation of 18 U.S.C. §§641 and 1343 are both found in U.S.S.G. §2B1.1 and call for a base level of six.

Specific Offense Characteristic: Pursuant to U.S.S.G. §2B1.1(b)(1), if the loss exceeded $5,000, increase the offense level according to the table provided. Application Note 2(A) states that subject to the exclusions in subdivision (D), loss is the greater of the actual loss or intended loss. Actual loss is defined as the reasonably foreseeable pecuniary harm that resulted from the offense. Intended loss is defined as the pecuniary harm that was intended to result from the offense and included intended pecuniary harm that would have been impossible or unlikely to occur. According to evidence submitted by the government, the total amount of actual loss which was disbursed by the Social Security Administration to the defendant and Codefendant Magana-Bonner was approximately $462,397. The actual loss figure also represents the amount of restitution being sought in this case.

In addition to the actual loss in this case, the government has cited that based on their already

filed applications, the defendant and Codefendant Magana-Bonner intended to collect social security benefits had the government not uncovered their fraud. This officer believes that the actual loss amount described in the preceding paragraph plus the additional intended loss is the appropriate loss amount in this offense. The Social Security Administration has calculated an additional $524,448 intended loss for the defendant and Codefendant Magana-Bonner. This intended loss figure was calculated from the point that each of their benefits stopped to the time that the defendants would have reached age 65 and their fictitious children would have reached age 18. The total amount of actual and intended loss for the defendant is $986,845. Pursuant to U.S.S.G. §2B1.1(b)(1)(H), since the loss is more than $400,000 but less than $1,000,000, the offense level is increased by fourteen levels.

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Specific Offense Characteristic: Pursuant to U.S.S.G. §2B1.1(b)(8)(C), if the offense otherwise involved sophisticated means, increase by two levels. Application Note 6(B) defines "sophisticated means" as especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. The defendant and Codefendant Magana-Bonner's scheme spanned approximately 17 years and involved numerous deceptive and repetitive acts to continue undetected. The defendant and Codefendant Magana-Bonner purposefully and systematically self-reported symptoms of mental illness unconnected to the SSA in order to bolster their fraudulent claims. They used a complex

"representative payee" system in order to avoid detection of their scheme. In addition, they used false identification and false documents from out of the United States to begin the process of establishing the fabricated children's identities in the United States. Pursuant to U.S.S.G. §2B1.1(b)(8)(C), two levels are added. +2

Victim-Related Adjustment: None. 0

Adjustment for Role in the Offense: According to the information provided by the government and the case agent, the defendant was charged along with his wife, Codefendant Magana-Bonner. It appears that the defendant and Codefendant Magana-Bonner played equal roles in the instant offense. Therefore, no adjustment is applicable pursuant to U.S.S.G. §§3B1.1 and 3B1.2. 0

Adjustment for Obstruction of Justice: The defendant made false statements to the court based on his competency to stand trial. Due to his false statements to the court, a two-level enhancement for obstruction of justice is applied pursuant to U.S.S.G. §3C1.1. +2

Adjusted Offense Level (Subtotal):

Adjustment for Acceptance of Responsibility: Conduct resulting in an enhancement under U.S.S.G. §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for her criminal conduct. This does not appear to be an extraordinary case in which an adjustment under U.S.S.G. §3C1.1 and 3E1.1 would apply. In addition, the defendant put the government to its burden of proof at trial by denying the essential

factual elements of guilty. Therefore, a reduction for acceptance of responsibility is not applied.

	0
Total Offense Level:	24
Chapter Four Enhancements: None	0
Total Offense Level:	24

Offense Behavior Not Part of Relevant Conduct

The government has evidence that the defendant has fraudulently obtained settlement money from the United States Department of Agriculture, Amtrak and Avis Rent-A-Car when he fraudulently filed class action claims against the companies. He received in excess of $50,000 in settlement funds from the aforementioned companies due to his fraudulent claims.

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

None.

Adult Criminal Conviction(s)

Date of Arrest (Age: 23)	11/15/73
Conviction/Court	Ct. 2: Theft/Cook County, Illinois Circuit Court
Date Sentence Imposed/ Disposition	12/17/73: Sentence to One Year Probation
Guideline	§4A1.2(e)(2)
Pnt	0

The Chicago, Illinois, Police Department arrest report was ordered; however, to date, it has not been received.

The defendant was convicted on a plea of guilty and was represented by counsel. Zero criminal history point were assigned, pursuant to U.S.S.G. §4A1.2(e)(2).

Date of Arrest (Age: 25)	4/28/75 Disorderly Conduct/Cook County, Illinois, Circuit Court
Date Sentence Imposed/ Disposition	3/25/76: Pled Guilty/Found Guilty Sentenced to $45 Fine and Court Costs
Guideline	§4A1.2(e)(2)
Pnt	0

The Chicago, Illinois, Police Department arrest report was ordered; however, to date, it has not been received.

The defendant was convicted on a plea of guilty and was represented by counsel. Zero criminal history point were assigned, pursuant to U.S.S.G. §4A1.2(c)(2).

Date of Arrest (Age: 30)	6/26/80 Theft/Cook County, Illinois, Circuit Court (80-3666)
Date Sentence Imposed/ Disposition	4/28/81/25/76: Sentenced to 30 Months Probation
Guideline	§4A1.1(c)
Pnt	0

The Chicago, Illinois, Police Department arrest report was ordered; however, to date, it has not been received.

The defendant was convicted on a plea of guilty and was represented by counsel. One criminal history point was assigned, pursuant to U.S. S.G. §4A1.1(c).

Date of Arrest (Age: 51)	8/16/01 Cts. 1-4: Mail Fraud Court 5: Theft of a Government Check/United States District Court, Northern District of Indiana (2:00CR55-01)
Date Sentence Imposed/ Disposition	4/27/01: Sentenced to 27 Months Custody of the Bureau of Prisons, 3 Years Supervised Release 5/29/01: Surrendered to the United States Marshal
Guideline	§4A1.2(a)
Pnt	3

The presentence investigation report authored by United States Probation Officer Louis Fuentes contains a summary of the defendant's conduct in the aforementioned offense. From approximately 1994 and continuing into November 1995, the defendant devised a scheme to defraud and obtain money

specifically the Department of Veteran Affairs ("VA") benefits belonging to Angelita Kettles and her two minor children by fraudulent pretenses and representations made to the VA.

Mrs. Kettles was once married to James Kettles, a Vietnam war veteran. In 1992, James Kettles died leaving Mrs. Kettles approximately $25,000 that he kept in a bank in New York, New York. Mrs. Kettles who resided in Brazil and could not speak, read or write in English did not understand the correspondence she had received from the VA regarding her husband's benefits and sought assistance from the defendant. The defendant, who, spoke some Portugese, handed Mrs. Kettles several documents written in English and told her to sign them. He advised Mrs. Kettles that she was signing a power of attorney, so that he could submit the documents on her behalf to the VA. Mrs. Kettles was not advised that she was agreeing to have her benefit checks mailed to Gary Indiana rather than Brazil or to have the defendant cash those benefit checks or later have the checks deposited to his bank account in Chicago, Illinois. Mrs. Kettles stated that she trusted the defendant because he had been a friend of her husband.

In July 1994, Mrs. Kettles received an $8,000 retroactive benefit check and in August she received what should have been the first of her monthly benefit payments. In August 1994, the defendant returned a VA form letter to the bureau containing a handwritten notation at the bottom of the page requesting a change of address to Angelita Kettles, Power of Attorney, Vernon Bonner, at a post office box in Gary, Indiana. Beginning in September 1994,

the benefit checks that Mrs. Kettles should have been receiving in Brazil started being sent to the defendant's P.O. Box in Gary, Indiana.

Throughout the scheme, the defendant deprived Mrs. Kettles of $16,000 that was erroneously mailed to and stolen by the defendant, The VA was deprived of over $32,000 resulting from the defendant's theft and Mrs. Kettles was defrauded out of and additional $3,000 which she wire transferred to the defendant for his alleged help in the matter.

The defendant was convicted on a finding of guilty and was represented by counsel. Three criminal history points were assigned, pursuant to U.S.S.G. §4A1.1(a).

According to Inspector General Special Agent Norene Williams, the defendant was receiving fraudulent social security benefits following sentencing in the aforementioned offense and up until he began his term of imprisonment for the offense.

The defendant was serving his sentence for the aforementioned offense at FCI Waseca, a low correctional federal facility. This officer conducted a telephonic interview with the defendant's case manager, Deanna Hiller on October 21, 2002. She stated that the defendant was designated to a low security facility due to his mental illness claims. She stated that he was unhappy with his designation and filed a report to change his classification level. She stated that he had numerous family members and friends write in to request that he be transferred to a minimum security facility. She reported that due to his alleged mental illness his report was denied. She stated that the defendant filed other reports requesting television access, computer access and

requests that he not work in the kitchen due to his paranoia about explosions. She reported that all of these reports were denied.

Criminal History Computation

One criminal history point was assigned to the defendant's conviction for theft. Three criminal history points were assigned for the defendant's conviction for mail fraud and theft of a government check.

In addition, the defendant committed the instant offense while under a criminal justice sentence. According to the 2001 edition of the Federal Sentencing Guidelines Handbook, Page 1020, the fact the defendant has not yet surrendered to serve his sentence does not change the fact that he is under a criminal justice sentence. The defendant had been sentenced to 27 months custody in case number 2:00CR55-01, but continued to fraudulently receive social security benefits until he surrendered to serve his term of imprisonment. Therefore, two additional criminal history points are assigned, pursuant to U.S.S.G. §4A1.1(d).

A total of 6 criminal history points were assigned, which corresponds to criminal history category III.

Other Arrests

Adult

Date of Arrest	Charge
5/12/77 (Age: 27)	Criminal Damage to Property
Agency	**Disposition**
Chicago, Illinois, Police Department	5/26/77: Stricken Out With

Leave to Reinstate

Date of Arrest	Charge
10/11/98	Mischief
(Age: 45)	
Agency	Disposition
Gary, Indiana, Police Department	5/8/00: Dismissed

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

Vernon Ralph Bonner was born on April 1, 1950, in Saint Louis, Missouri, to Walter Levern Hadley and Annie Bonner. The defendant is the only child born to this union. The defendant stated that he was not good at recalling dates and indicated that he has resided in Saint Louis, Missouri, Amory, Missouri; Chicago, Illinois; and Gary, Indiana in his lifetime. He was residing in Gary, Indiana prior to his conviction for mail fraud and theft of a government check in 2001.

The defendant reported that he was predominantly raised by his maternal grandmother although he could not recall why he did not live with his mother or father full-time. He reported that he lived off and on with his father and had a decent relationship with him. The defendant reported that his parents were never married and did not reside together when he was a child. The defendant iterated that his father had three other children, but the defendant has never had any contact with them. The defendant denied any history of domestic violence or substance abuse of either of his parents. He also denied that either of his

parents have ever been convicted of a crime. He stated that he had a decent relationship with his family while growing up and iterated that he continues to talk to his mother occasionally.

The defendant's father died in the early 1970's. The defendant stated that he does not recall his father's age when he died or the cause of his death. Prior to his death, the defendant's father resided in Saint Louis, Missouri, but the defendant was unsure of his occupation. The defendant stated that his father had a history of mental illness and was in and out of the hospital for treatment of his mental illness. The defendant could not recall with what illness his father had been diagnosed. The defendant's mother, who is in her early 70's, resides in Saint Louis, Missouri, and is a retired silk screen printer.

The defendant married Deborah Bonner (nee: McGregory) in the early 1970's. The defendant reported that he and Ms. McGregory "didn't get along" and subsequently divorced. He could not recall when they divorced. One child was born to this union. Walter Bonner is 33. The defendant stated that although he has supported Walter Bonner financially, he has not had contact with his son in approximately seven years. He reported that he does not know where his son resides or where he is employed. The defendant opined that he does not have contact with his son because his ex-wife has turned his son against him with untruthful statements.

The defendant declined to discuss any other children that he may have. He would not disclose names and locations of any other children.

The defendant married Maria Bonner (nee: Magana) in 1976. Mrs. Bonner is the defendant's codefendant

in the instant offense. The defendant stated that although they have had their ups and downs, they generally have a decent relationship. He stated that their relationship has been stressful since both of them are currently in prison.

Physical Condition

The defendant is a Black male who stands 5'8" tall and weighs approximately 175 pounds. He has brown eyes and black hair. He reports that he does not have any tattoos on his person. He did report that he has a scar on his right wrist although he could not recall how he received the scar.

The defendant stated that he has a 25-year history of back and eye problems. He reportedly could not recall how and when he was injured. He reported that he takes Ibuprofen and Tylenol for pain related to his back. The defendant stated that he has been treated at Cook County Hospital and University of Chicago Hospital, located in Chicago, Illinois, and Methodist Hospital located in Merrillville, Indiana, but he could not recall the dates he was treated.

Correspondence received from Cook County Hospital indicates that the defendant was treated in October 1986 for blurry vision. He was diagnosed with functional vision loss. He underwent an EEG of which the results were normal. Correspondence received from Methodist Hospital indicate that the defendant was treated for hearing loss in January 2001. He underwent a CAT scan which produced normal results.

The defendant reported that in approximately 2001, he injured both of his arms when he fell from the top bunk at Waseca Correctional Facility located in Waseca, Minnesota. Correspondence received from

the aforementioned institution confirm that the defendant reported that he had fallen from the top bunk on July 14, 2001. They stated that the defendant was examined on July 16, 2001 due to his request and there were no objective findings by the examining clinician.

In addition, the defendant opined that he has arthritis in his right shoulder and his right foot "just hurts." There is no medical documentation to confirm any of the aforementioned injuries.

Mental and Emotional Health

The defendant reported that he has a 25-year history of depression and stated that he has been diagnosed with Schizophrenia. He reported that he has been suicidal in the past, but denied any current suicidal ideations. The defendant reported that his primary care physician is Dr. Matthew Castelino with Edgewater Systems, located in Gary, Indiana. Correspondence from Edgewater Systems confirmed the defendant's treatment and stated that the defendant was diagnosed with chronic undifferentiated schizophrenia, schizoaffective disorder and major depression with psychotic symptoms in April 2001 due to self reports of auditory hallucinations and paranoid ideations. There is no indication as to any psychiatric testing that the defendant underwent to obtain the aforementioned diagnosis. He was reportedly prescribed Zyprexa and Ativan. The defendant stated that he has seen other doctors for mental health reasons, but he could not recall where or when he was treated.

The defendant underwent a complete psychiatric evaluation for the purpose of determining his

competency for trial in the instant offense. The evaluation was conducted by Dr. Konoy K. Mandal, a Fellow in Forensic Psychiatry for the Isaac Ray Center, located in Chicago, Illinois. Dr. Mandal submitted a report to the court dated February 12, 2002 which stated that the defendant was competent to stand trial in the matter and was "malingering in his psychotic, cognitive and other psychiatric presentation. Dr. Mandal concluded by diagnosing the defendant with Depression, Not Otherwise Specified; Malingering, Antisocial Personality Disorder Traits and Rule Out Lower Back Pain.

Substance Abuse

The defendant denied any use of illicit substances. He additionally stated that he has never received substance abuse counseling. Due to the defendant's imprisonment, a urine specimen was unable to be collected by the probation office.

Education and Vocational Skills

The defendant reported that he attended West Amory High School, located in Amory, Mississippi, from 1966 until 1967. He reportedly left during the ninth grade so that he could work. Correspondence received from the aforementioned school verified the defendant's attendance. He reportedly obtained his General Equivalency Degree, but he couldn't recall when or where he received it.

The defendant reportedly attended DeVry University, located in Chicago, Illinois, in the early 1980's where he studied digital engineering. He reportedly received his associates degree in approximately 1983. A written request for student records was sent to the aforementioned school; however, to date, a response has not been received.

Employment Record

August 15, 2001 to Present (Verified).

The defendant has been detained at the Metropolitan Correctional Center in Chicago, Illinois, during this time period.

1992 to 2000 (Verified).

The defendant reported that he was unemployed during the aforementioned time period collecting social security disability payments. He has been convicted in the instant offense for illegally receiving disability payments.

Financial Condition: Ability to Pay

The defendant submitted a signed financial statement which supports the financial profile below:

*Indicates the defendant's share of an asset held jointly with his wife Maria Magna-Bonner

Assets

Cash	
None	$ 0
Subtotal:	$ 0
Equity in Other Assets	
2001 Hyundai Elantra*	$ 0
1995 Geo Metro*	325
5072 Carolina Gary, Indiana*	10,000
Subtotal:	$10,325
Total Assets:	$10,325

Unsecured Debts

None	$ 0

Total Unsecured Debts:	$ 0
NET WORTH:	$10,325

Note A: The defendant owns a 2001 Hyundai Elantra. According to Kelly Blue Book, the vehicle has a current fair market value of approximately $7,035. The defendant reportedly has an outstanding loan for this vehicle in the amount of $10,000. Therefore, the defendant does not have any equity in the vehicle.

Note B: The defendant owns a 1995 Geo Metro. According to Kelly Blue Book, the vehicle has a current fair market value of approximately $650. The defendant reportedly does not have an outstanding loan for this vehicle. The aforementioned amount represents the defendant's share of the equity in this vehicle.

Note C: The defendant stated that his home has a current fair market value of approximately $20,000. The defendant reportedly does not have an outstanding loan on this residence.

Analysis

The defendant has a positive net worth of $10,325. The defendant stated that he had been involved in civil suits, but he could not recall the specifics regarding the suits. The government provided information which stated that the defendant was involved in at least three class action lawsuits and fraudulently obtained over $50,000 from his fraudulent claims. The defendant did not report these earnings to the probation office stating that he could not recall the specifics from the lawsuits.

It should be noted that pursuant to 18 U.S.C. §3663A, the court is required to order full restitution when there is an identifiable victim who suffers a physical

injury or pecuniary loss. The defendant is facing a significant period of incarceration, and while incarcerated he will be able to make monthly restitution payments through the Inmate Financial Responsibility Program. The defendant has the ability to pay any remaining balance during his period of supervision. In addition, it is this officer's assessment that the defendant would not be able to pay a fine in this matter or the additional costs of her supervision due to his limited assets.

PART D. SENTENCING OPTIONS

Custody

Statutory Provisions: On Counts One through Four, the maximum term of imprisonment is five years per count, for a total of 20 years, pursuant to 18 U.S.C. §1343. On Counts Five and Six, the maximum term of imprisonment is ten years per count, for a total of 20 years, pursuant to 18 U.S.C. §641.

Guideline Provisions: Based on a total offense level of 24 and a criminal history category of III, the guideline range for imprisonment is 63 to 78 months.

Impact of the Plea Agreement

The defendant was found guilty in a jury trial on August 1, 2002, and therefore no plea agreement exists.

Supervised Release

Statutory Provisions: If a term of imprisonment is imposed on Counts One through Six, the Court must impose a term of supervised release of not more than three years each, pursuant to 18 U.S.C. §3583(b). Pursuant to U.S.C. §3624(e), a prisoner whose sentence includes a term of supervised release after

imprisonment shall fun concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject during the term of supervised release.

Guideline Provisions: The Court shall order a term of supervised release to follow imprisonment when required by statute. Pursuant to U.S.S.G. §5D1.2(a), the authorized term for supervised release shall be at least two years but not more than three years, or the minimum period required by statute (three years), whichever is greater, on Counts one through six.

Probation

Statutory Provisions: On Counts One through Six, the defendant would be eligible for not less than one not more than five years probation by statute, pursuant to 18 U.S.C. §3561(c)(1).

Guideline Provisions: Because the applicable guideline range is in Zone D of the Sentencing Table, the defendant is not eligible for probation, pursuant to U.S.S.G. §5B1.1(a).

Fines

Statutory Provisions: The maximum fine is $250,000 per count on Counts One through Six, for a total of $1,500,000, pursuant to 18 U.S.C. §3571. A special assessment of $100 on each count is mandatory, for a total of $900, pursuant to 18 U.S.C. §3013.

Pursuant to 18 U.S.C. §3612(f)(1), interest shall be paid on any fine or restitution of more than $2,500 unless the fine is paid in full before the fifteenth day after the judgment. Pursuant to 18 U.S.C. §3612(f)(3), if the Court finds that the defendant does not have

the ability to pay interest under this subsection, the Court may waive the requirement for interest; limit the total of interest payable to a specific dollar amount; or limit the length of the period during which interest accrues.

Guideline Provisions: The fine range for this offense is from $10,000 to $100,000, pursuant to U.S.S.G §5F.1.2(c)(3), the Fine Table.

Subject to the defendant's ability to pay, the Court may include in the fine an amount that is at least sufficient to pay the cost to the government of any imprisonment, probation, or supervised release, pursuant to U.S.S.G. §5E1.2(d)(7). The most recent advisory from the Administrative Office of the United States Courts suggests a monthly cost of $1,848.00 to be used for imprisonment, a monthly cost of $1,383.50 for community confinement, and a monthly cost of $270,59 for supervision.

Restitution

Statutory Provisions: Pursuant to 18 U.S.C. §3663A, restitution shall be ordered in this case. Restitution in the amount of $462,397 is outstanding to the Social Security Administration. Payments may be forwarded to the Social Security Administration, Debt Management Section; Attn: Court Refund; P.O. Box 2861; Philadelphia, Pennsylvania 19122. Any unpaid restitution shall become a condition of probation or supervised release, pursuant to 18 U.S.C. §3663(g).

Guideline Provisions: In accordance with the provisions of U.S.S.G. §5E1.1, restitution shall be ordered.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

The probation officer has no information concerning the offense or the offender which would warrant a departure from the prescribed sentencing guidelines.

Respectfully submitted,
Richard L. Tracy
Chief U.S. Probation Officer

By: /s/
Lisa B. Hepner
U.S. Probation Officer

Approved:

/s/
Susan Rozanski
Supervising U.S. Probation Officer

LBH:lbh

Attachments: Government's Version
(Including Victim Impact Statement)

Subject: United States v. Maria Magana-Bonner and Vernon Bonner, 01 CR 670

Date: October 1, 2002

To: Lisa B. Hepner
Fax: 408-5045
U.S. Probation Officer

From: Stuart J. Chanen
Fax: 353-8881
Assistant U.S. Attorney

GOVERNMENT'S VERSION OF THE OFFENSE

I. INTRODUCTION

From as early as May 1983 to and including the date of their conviction, Maria Magana-Bonner (hereafter "Magana") and Vernon Bonner (hereafter "Bonner") purposefully, systematically, cold-heartedly, and without one shred of remorse stole just under $500,000 from disabled and poor persons who desperately needed the money. Although the money was stolen more directly from the Social Security Administration ("SSA") and the Department of Education ("DOE"), let there be no doubt that the money they stole and put in their own pocket was taken from other needy applicants of these government funds.

Defendants were the Bonnie and Clyde of Social Security fraud, becoming more and more brazen with each passing day, and when clearly caught in their crimes, they simply thumbed their noses at the government, and continued to demand their "rightful" benefits, forever confident that they would never be caught, or at least never be made to account for what they have done. At the sentencing of these

defendants, this Court, respectfully, should now leave no doubt through an appropriately lengthy sentence that defendants have been called to account.

II. PROCEDURAL HISTORY

On July 25, 2001, a federal grand jury indicted defendants in a nine-count indictment.

Counts One through Four were against both defendants for wire fraud and for aiding and abetting each other in the scheme to defraud, in violation of 18 U.S.C. § 1343 & 2. More specifically, defendants were charged with knowingly devising and intending to devise a scheme to defraud SSA and to obtain monthly federal social security disability benefits and other social security benefits by means of materially false and fraudulent pretenses, representations, and promises.

Counts Five and Six were against both defendants for theft of government funds and aiding and abetting each other in such thefts, in violation of 18 U.S.C. §§ 656 & 2.

Counts Seven through Nine were against defendant Maria Magana for devising a scheme to defraud DOE and to obtain money and property from the DOE by means of materially false and fraudulent pretenses, representations, and promises. More specifically, Count Seven charged mail fraud in violation of 18 U.S.C. §§ 1341; Count Eight charged wire fraud in violation of 18 U.S.C. §§ 1343; and Count Nine charged theft of DOE funds in violation of 20 U.S.C. §§ 1097(a). (Title 20 is the Department of Education Title.)

On August 16, 2001, defendant Bonner was arraigned and pled not guilty. On August 20, 2001,

defendant Magana was arraigned and pled not guilty. On July 31, 2002, the government sought leave to file a variance to the indictment for purposes of correcting certain typographical errors, which motion was unopposed and granted the same day. A copy of the corrected indictment is attached as Exhibit A.

III. THE INDICTMENT, THE TRIAL, AND THE EVIDENCE

The Court is well aware of defendants' scheme and the evidence submitted at trial, but for the benefit of the Probation Office and to establish further a clear record, the government briefly summarizes here the allegations of the indictment and the government's evidence at trial.

The indictment in this case alleged that from in or about 1984 to and including the date of the indictment, July 25, 2001, the defendants falsely represented, among other things, that they each suffered from severe physical and mental illnesses and impairments that supposedly precluded them from engaging in employment and from engaging in basic daily life activities, such as driving, caring for themselves, and performing common household chores, The purpose of the scheme was to get the social security administration to pay them social security disability benefits even though they were fully capable of working.

As a further aspect of the scheme, defendant fabricated two children, a boy, Diego Magana, was allegedly born to Maria Magana in Guatemala, and a girl, Virginia Bonner, was allegedly born to Vernon Bonner in Mexico. The purpose of fabricating these children was to claim additional, dependent child

benefits over and above the disability benefits they were already receiving.

Similarly, defendants claimed that Bonner's actual son, Walter Bonner, was living with them as a dependent, which was also false. (This fact was admitted at trial as related evidence, but was not alleged in the indictment.)

Finally, the indictment asserted a separate scheme by Maria Magana to obtain through fraud federal and state higher education grants.

At the trial of this case, which was conducted from July 22, 2002, to August 1, 2002, the government proved beyond a reasonable doubt:

- that defendants feigned and exaggerated various symptoms of *physical* illness and disease that supposedly precluded them from working and from engaging in basic life activities, such as driving, caring for himself, and performing common household chores;
- that defendants aided and abetted claims by the other that they suffered such physical illness;
- that defendants feigned and exaggerated various symptoms of *mental* illness and disease in order to obtain benefits (including collectively claims of a nervous condition, depression, suicidal thoughts, delusions, auditory hallucinations, visual hallucinations).
- that defendants aided and abetted claims by each other that they suffered such symptoms of mental illness;

- that defendants prepared and signed numerous false and misleading social security applications and related documents to effectuate their scheme and aided and abetted each other in doing so;
- that defendants provided SSA with numerous false oral answers in order to effectuate their scheme and aided and abetted each other in doing so;
- that defendants fabricated two children, Diego Magana and Virginia Bonner, and falsely asserted that those children resided with Maria's sister Hilda Castillo;
- that Walter Bonner was not a dependent child of Magana and Bonner at any time; and
- that defendants repeatedly and falsely identified Maria Magana as Vernon Bonner's "representative payee," while at the same time repeatedly and falsely identifying Hilda Castillo as Maria's representative payee.

The similarities of defendants' alleged disabilities are attached in a chart as Exhibit B. The similarities of defendants' alleged restrictions on their daily life activities are attached in a chart as Exhibit C. The timelines comparing their alleged disabilities with the evidence of their actual functioning is attached in charts as Exhibits D and E.

With respect to defendant Magana's education fraud, the evidence established that on numerous grant applications, for the purpose of both concealing her lack of eligibility and concealing her ongoing social security fraud, defendant Magana misrepresented:

- her social security number;
- her state of residence;
- her marital status;
- that she had dependent children;
- that she received no social security benefits; and
- that she had no driver's license number.

In 25 minutes, the jury convicted defendants on all nine counts. The message from this jury was loud and clear: not one juror believed that defendants had a mental illness that entitled them to social security benefits; not one juror believed that defendants had dependent children; not one juror believed that defendant Magana had been truthful in her grant applications. If just one juror had had any doubt about any of these issues, the deliberations would have had to have extended beyond the extremely brief time that they did.

IV. SENTENCING ISSUES

A. Maximum Possible Penalties

Defendant Maria Magana was convicted of five counts of wire fraud, one count of mail fraud, and one count of education theft fraud (20 U.S.C. § 1097(a)), each of which carries a maximum term of five years imprisonment. Defendant Magana was also convicted of two counts of theft of government funds, which carries a maximum term of ten years. Therefore defendant Magana faces a maximum term of 55 years imprisonment. She also faces a fine of up to $250,000 on each count, for a total maximum fine of $2,250,000, and a total term of supervised release of

not more than three years on each count, for a total maximum term of supervised release of 27 years.

Defendant Vernon Bonner was convicted of four counts of wire fraud, which carries a maximum term of five years imprisonment, and two counts of theft of government funds, which carries a maximum term of ten years, for a total potential maximum term of 40 years imprisonment. He also faces a fine of up to $250,000 on each count, for a total maximum fine of $1,500,000, and a total term of supervised release of not more than three years on each count, for a total maximum term of supervised release period of 15 years.

B. Guideline Offense Level

a. Applicable Guideline Manual

The November 2001 Guideline Manual applies because defendants' scheme continued through and including the date of defendants' conviction.

b. Grouping

The convictions on each of the nine counts are grouped under Guideline Section 3D1.2(d).

c. Applicable Offense Level

The applicable Guideline Section is 2B1.1, and defendants' base offense level is 6. The base offense level then must be increased by "the greater of the actual loss or intended loss." Guideline Section 2B1.1 Application Note 2(A). This application note "'*requires* district courts to increase a defendant's offense level based upon the greater value of either the actual loss suffered by the victims or the intended . . . loss which the defendant attempted to inflict on the victims." *United States v. Kipta*, 212 F.3d 1049, 1051 (7th Cir.

2000)(quoting *United States v. Saunders*, 129 F.3d 925, 930 (7th Cir. 1997))(emphasis added) (referring to the 2B1.1's predecessor provision, 2F1.1).

"Actual loss" means the "reasonably foreseeable pecuniary harm that resulted from the offense." Application Note 2(A)(i). In this case, actual harm is the actual dollar amounts paid out to Magana and Bonner as a result of their scheme. These amounts are as follows:

SSA payments paid in the name of Vernon Bonner	$	175,842.00
SSA payments paid in the name of Maria Magana	$	189,835.00
SSA payments paid in the name of Diego Magana	$	43,966.00
SSA payments paid in the name of Virginia Bonner	$	41,166.00
SSA payments paid in the name of Walter Bonner	$	11,568.00
SSA TOTAL for MAGANA and BONNER	$	**462,397.00**
DOE (and Illinois MAP) grants paid to Maria Magana	$	$24,999,00
TOTAL for MARIA BONNER	$	**487,396.00**

These amounts, however, are not the full amount of the loss for purposes of Guideline Section 2B1.1. "Intended Loss" means "the pecuniary harm that was intended to result from the offense." Application Note 2(A)(i). Here, had defendants not been caught, they would have been entitled to benefits until age 65 for themselves and until age 18 for their fabricated children. Had defendants not been caught, there can be no dispute they would have tried to collect

payments for that entire time period. Faced with facts virtually identical to this, that is precisely what Judge Philip Reinhard held in *United States v. Rettenberger*, 01 CR 50016 (N.D. Ill. Aug. 9, 2002). The sentencing transcript in which he applies intended loss is attached as Exhibit F. *See also United States v. Haber*, 251 F.3d 881 (10th Cir. 2001).

Here, the loss is the amount that defendants would have recovered from the Social Security Administration based on their already filed applications had the government not uncovered their fraud. See *Haber*, 251 F.3d at 893 ("Had [the victim] not investigated [defendant's] claim and discovered his fraud, it would have continued to pay him $5,000 a month throughout his working life").[1] Here, the intended loss amount figures have been calculated by the SSA from the point that each of their benefits stopped to the time that defendants would have reached age 65 and until their fabricated children would have reached age 18.

Additional intended loss in the name of Vernon Bonner	$	180,264.00
Additional intended loss in the name of Maria Magana	$	218,700.00
Additional intended loss in the name of Virginia Bonner	$	56,484.00
Additional intended loss in the name of Diego Magana	$	69,000.00
TOTAL Additional intended loss	$	**524,448.00**

[1] While defendant Bonner's benefits stopped for a separate reason — his conviction in an unrelated fraud — that conviction does not in any way alter the fact that at the time he committed the fraud in this case, he intended his benefits to continue.

In sum, the loss that was intended by the defendants is both the amounts they actually received, and the additional amounts they intended to receive had their schemes not been uncovered. The total loss amount for purposes Guideline Section 2B1.1(b)(1) is $986,845.00 for Vernon Bonner and $1,011,844.00 for Maria Magana.

For defendant Bonner, his offense level must be increased 14 levels because the loss is more than $400,000, but not more than $1,000,000.

For defendant Magana, her offense level must be increased 16 levels because the loss is more than $ 1,000,000, but not more than $2,500,000.

C. Adjustment and Departures to the Offense Level

1. 2B1.1(b)(8) — 2-Level Increase for Sophisticated Means

The government submits that defendants used sophisticated means to perpetrate their fraud. The sophisticated means enhancement is not limited to offshore bank accounts or corporate shells, but includes any "especially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense." Here, the government submits that defendants used sophisticated means to execute and conceal their scheme. In order to execute it, defendants needed to do much more than just claim to have mental illness or just claim to have children. The scheme went well beyond the false forms they filed with the SSA. For example, with respect to the illness, they purposefully and systematically self-reported symptoms of mental illness to hospitals and private physicians unconnected to the Social Security Administration

and who were unaware that defendants were using their medical reports to obtain disability benefits; defendants would then place the conclusions of these unwary psychiatrists and hospitals before the Social Security Administration to bolster their claims. *Compare Rettenberger*, Transcript at 8-10 (Reinhard, J.) (attached as Exhibit F). Defendants also used a multi-pronged false "representative payee" scheme to conceal that they were in fact fully competent to work, and then further used several false addresses and mail drops to conceal the fact that there was no representative payee. Finally, with respect to fabricating false children, defendants used false identification documents from out of the country in order to begin the process of establishing the children's identities in the United States. Again, on facts very similar to these, Judge Reinhard held that the sophisticated means adjustment applied. *Id.*, citing *United States v. Kontny*, 238 F.3d 815, 820 (7th Cir.2001); *United States v. Friend*, 104 F.3d 127, 129-30 (7th Cir. 1997); and *United States v. Madoch*;108 F.3d 761, 765-66 (7th Cir. 1997); *United States v. Charroux*, 3 F.3d 827, 836-37 (5th Cir. 1993).

2. 2-Level Increase for Obstruction of Justice

Maria Magana should receive at least a 2-level increase for obstruction of justice, perhaps a 3-level increase. Maria Magana repeatedly lied to this Court. She lied about her inability to assist in her defense. She lied about her competence to stand trial. She lied with respect to her need to see "Dr. Hannah in Gary, Indiana," and she lied about her "$400 monthly medication costs." As set forth further below, defendant Magana could independently receive an obstruction enhancement for lying to the court first,

in her motion to modify her pretrial release, and second, in her motion for a finding of incompetency to stand trial. Either one of those motions would merit a two-level enhancement; together they could merit an upward adjustment of two or three levels.

First, Maria Bonner orally sought bond on August 20, which request was *denied*. Then, on September 17, 2001, Maria Magana filed a motion to set bond, which was *denied* on October 17, 2001. On October 26, 2001, she again filed a motion for release on bond. Based on the representation, among others, that Magana needed to be released to see her treating physician, the Court released Magana on November 21, 2001. Two months later, on January 24, 2002, apparently unhappy with her then current bond conditions, Magana filed a motion in this Court, attached as Exhibit G, seeking to have her pretrial release modified to permit her "to live in her own home" and without the requirement of a custodian. In support of her request, defendant represented that her "monthly medication costs are $400.00" and that she was "currently seeing Dr. Hannah in Gary, Indiana." Both statements were lies in order to induce this Court to remove defendant's custodian and to allow her to move into her own home. (The government also believed the lies, not opposing the motion.) Later, however, the government learned that Magana had never seen Dr. Hannah either in December of 2001 or at time in January, nor at any time subsequent to the motion. The government then made repeated requests of Magana through her counsel for any evidence that she had been prescribed $400 or even $1 in medication during this period, none of which was ever provided, not even the names of the pharmacies where she allegedly purchased the

drugs. Therefore, the government submits that Magana told a series of lies to the Court in order to have her pretrial release terms modified.

As the Court is aware, defendant Magana also moved the Court to hold that she was incompetent to stand trial. She first moved orally for a determination of her mental competency on September 13, 2001. That motion was deferred, but ultimately denied on January 2, 2002, without prejudice. Magana renewed her motion, this time in writing, which she filed on July 12, 2002, just 10 days before the trial was to begin. In the motion, Magana's attorney stated that Magana was unable to assist him prepare for trial, and she was therefore incompetent to stand trial. The Court then delayed the trial, and set a competency hearing for July 22, 2002. As the Court is now well aware, Magana did not appear for the hearing. Her failure to appear was a very part of the charade that she was not competent. In addition, it was a direct violation of her bond, which required her to appear at all subsequent hearings. (While her presence had been excused for some status hearings, it had not been excused for this hearing, which originally had been scheduled as the first day of trial.)

As the Court now also knows, defendant's claim of incompetence was a complete fabrication. The Court need not look any further than the detailed personal and historical information that defendant provided to her defense counsel for each and every cross-examination to know that the repeated assertions that Magana was incapable of assisting in her own defense was a lie. The Court is also aware that the psychologist who opined at the competency hearing that "he had concerns she may be incompetent" had simply had the wool pulled over his

eyes, or worse, simply parroted what was asked of him for a fee. The court is aware that the supposed expert ignored six binders of documents in reaching his "expert conclusions," and that he never spoke with a single parent, sibling, teacher, colleague, or friend in reaching his now discredited opinions.

The law with respect to obstruction of justice for "feigned incompetency" to stand trial is clear. In *United States v. Greer*, 158 F.3d 228 (5th Cir. 1998), the district court concluded (as this Court did in this case on July 22, 2002) that defendant had feigned incompetence. The district court adjusted defendant's sentence two levels for obstruction of justice, based on defendant's motion of incompetence and other actions taken by defendant to disrupt the trial. In a detailed and carefully reasoned opinion, the Fifth Circuit Court of Appeals affirmed the sentencing adjustment. The court first held as a matter of law that feigning incompetence is the type of obstructive behavior for which section 3C1.1. was intended to reach. **Greer**, 158 F.3d at 235 ("[p]utting on the pretense of incompetency demands not only dramatic ability but planning and resolve"). **See also United States v. Abdelkoui**, 19 F.3d 1178, 1182-83 (7th Cir. 1994) and **United States v. Hall**, 101 F.3d 1174, 1178-79 (7th Cir, 1996) — both cited with approval in **Greer** at 236. The court further held that applying the enhancement to someone who claims incompetency does not impermissibly chill or punish the exercise of a constitutional right. **Greer**, 158 F.3d at 237-38, Finally, the court held that it was permissible to apply the enhancement for feigning incompetency even if the defendant was otherwise suffering from personality disorders. **Id.** at 238-40. **Greer** is persuasive, and the Court should enhance defendant

Magana's sentence at least two levels for obstruction of justice.

With respect to Vernon Bonner, he also feigned incompetence. On September 13, he moved orally for a determination of his competence, which motion this Court granted on September 20 and granted further on September 27, 2001. At that point, at great expense to the government, Vernon Bonner's fraud continued, as the Isaac Ray Center that evaluated Bonner concluded unambiguously that Vernon Bonner was malingering mental illness for purposes of avoiding his trial. The report by the Isaac Ray Center took over six months, and involved the work of both a psychiatrist and psychologist, and numerous trips by the United States Marshal Service, frivolously delaying the trial of the case and costing the government tens of thousands of dollars. The motion was officially denied March 20, 2002, based solely on the unambiguous report of the Isaac Ray Center. A copy of that report has been previously produced to the Court, and will be produced to the Probation Office under separate cover. For the reasons stated above, as set forth in more detail in the **Greer** case, the Court should increase defendant's offense levels two levels for obstruction of justice.

D. Criminal History and Upward Departure

Based upon information currently available to the government, defendant Vernon Bonner has three criminal history points for his September 20, 2000 conviction in the Northern District of Indiana for fraud (which conviction was affirmed by the Seventh Circuit on September 13, 2002 — Exhibit H).

Defendant Bonner is therefore presumptively in criminal history category II. Because his criminal history category, however, "does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." U.S.S.G. § 4A1.3. Here, the government requests the Court to do so. In making a determination of whether to depart upward on defendant criminal history category, the Court may consider, among other things, "prior similar adult criminal conduct not resulting in a criminal conviction." U.S.S.G. § 4A1.3(e).

For the conviction that results in three criminal history points, defendant Bonner defrauded Angelita Kettles, a widow and family friend, of approximately $7,642 by falsely representing to the Department of Veteran Affairs that he was the children's uncle, that the children lived with him, and that he was their authorized payee. Bonner also defrauded the VA of an additional $32,952 by telling the VA that Kettles had never received a $32,952 check owed to her and that it should re-issued in his name as the custodian of the funds. Later, when the VA contacted Bonner and told him that the check had been issued twice, he directed the VA to take any money owed back out of Kettles' continuing benefits, and her benefits at that point were discontinued until the fraud was uncovered.

In June 1999, defendant defrauded the United States Department of Agriculture (USDA) of a share of a class action settlement fund, falsely claiming on a class action "Claim Sheet and Election Form" that he had been an African American farmer and that the

USDA had refused to grant him a loan in Monroe County, Mississippi. Bonner cheated the USDA out of approximately $50,000.

In June 2000, defendant Bonner defrauded Amtrak of a share of a class action settlement fund, falsely claiming on a class action "Claim for Cash Award" that he had applied for a job with Amtrak in Chicago in June 1995 for any available entry level job. Furthermore, defendant Vernon Bonner claimed that he was qualified to work for Amtrak because, among other things, he was an "electrician" and a "heavy equipment operator." Defendant Vernon Bonner received $1,479.88 from the settlement fund.

The government also has evidence that Bonner filed yet another class action claim with the Avis Rent-A-Car Settlement Fund and in June 2000 was paid from that fund. (This evidence, in the form of tax records, requires an order from the Court, prior to disclosure — even to the Court.)

These repeated frauds, coupled with the fact that defendant's crime of conviction was a continuous crime from 1983 through at least 2001, are a sufficient basis for the Court to believe that criminal history category II does not adequately reflect the seriousness of defendant's past criminal conduct, nor does it adequately reflect the likelihood that the defendant will commit other crimes after his incarceration. The Court should therefore consider departing upward to criminal history category III or IV.

E. Sentencing Range

In sum, defendant Magana is at a total offense level of 26 or 27 (depending on the level increase for obstruction). In criminal history category I, the

sentencing range is either 63-78 months or 70-87 months.

Defendant Bonner is at a total offense level of 24. If the Court increases his criminal history category to criminal history category III, the sentencing range is 53-78 months. If the Court increases the criminal history category to category IV, the sentencing range is 77-96 months. Without adjustment to criminal history, the sentencing range is 57-71 months.

F. Restitution

Defendants jointly and severally owe restitution to the Social Security Administration in the amount of $462,397.00. Restitution must be paid to the Social Security Administration, Debt Management Section, Attn: Court Refund, P.O. Box 2861, Philadelphia, PA 19122.

Defendant Magana owes additional restitution to the Department of Education in the amount of $17,130.00, and the Illinois Student Assistance Commission in the amount of $7,869.00. Restitution must be paid to the Department of Education, c/o Nancy Hoglund, Supervisor of Accounts Receivable, 600 Independence Ave. SW, FOB NB Room 34000, Washington, DC 20202-4330. Restitution must be paid to the Illinois Student Assistance Commission, 1755 East Lake Cook Road, Deerfield, Illinois, 60015.

V. VICTIM IMPACT

The literal victims in this case are the Social Security Administration, the Department of Education, and the Illinois Student Assistance Commission. They were defrauded and are collectively owed in excess of $500,000.

The true victims in this case, however, are people with disabilities who might have been eligible for benefits but for the monies that went to the Bonners that was no longer available; and the students who did not receive grants that went instead to Maria Magana, and the students who provided honest applications to the University of Minnesota MacCarthur Program, whose spot Magana took instead.

Finally, not only have these federal and state agencies lost money to these undeserving criminals, as well as time and money in uncovering and prosecuting their fraud but in addition the defendants' crimes have the broader consequence of eroding confidence in the social security and governmental financial aid systems.

VI. INVESTIGATING AGENCY AND AGENT

Three agencies cooperated fully in investigating defendants. The Social Security Administration-Office of the Inspector General was represented by Special Agent Norene Williams, who can be reached 353-5707. The Department of Education-Office of the Inspector General was represented by Special Agent David Skonieczny, who can be reached at 353-8432. The Federal Bureau of Investigation was represented by Special Agent Ronald Carver, who can be reached at 986-6534.

VII. RECOMMENDATION

For the reasons stated above, defendant Magana should be sentenced in criminal history category I at offense level 26 or 27. The government believes she should be sentenced at the high end of her guideline range.

Defendant Bonner should be sentenced in criminal history category III or IV at offense level 24. The government believes he should also be sentenced at the high end of his guideline range.

The government respectfully reserves the right to supplement or modify its recommendation after the PSI becomes available for review.

cc (w/o exhibits):

Defendant Magana's Counsel James Fennerty
Defendant Bonner's Counsel Robert Edwards
HHS-OIG Special Agent Norene Williams
DOE-OIG Special Agent David Skonieczny
FBI Special Agent Ron Carver

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	No. 01CR 670
	)	Judge Geroge
	)	W. Lindberg
MARIA MAGANA BONNER and	)	
VERNON BONNER	)	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORALBLE
GEORGE W. LINDBERG

AS TO VERNON R. BONNER,
MARIA E. MAGANA-BONNER

July 26, 2006

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THE COURT: And it will be the ruling of the Court that it was totally reasonable -- first of all, the intended loss includes both the actual loss and what could reasonably be expected based on, in this case, 14 to 17 years of conduct. It is totally reasonable to conclude that it would go until you were officially terminated because of arriving at age 65. And so the Court would overrule any objection to that analysis as to the intended loss.

* * * *

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THE COURT: Yes.

MR. HANDELSMAN: Well, I'm sure he did. I mean, that's what the Seventh Circuit has said. The Supreme Court case, Pasquantino, just came down last year, and I don't think --

THE COURT: But I don't know if it was an issue in the trial --

MR. HANDELSMAN: No, I don't think it was raised there.

THE COURT: That's my point. But this Court finds that it's a civil penalty and is not an issue that has to be found by the jury. . . .

* * * *

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THE COURT:

As they are grouped together as explained on lines 132 to 141 of the presentence report, the base offense level for the offense of conviction is six. Special characteristics of your offense include the intended loss exceeded the actual loss of $462,397.

The Court finds that the additional loss as calculated by the Social Security Administration of $524,448 is a reasonable estimate of the additional loss

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for the reasons explained on lines 142 to 165 of the PSR, which the Court adopts.

Therefore, the total intended loss is the sum of the actual loss and the additional loss that would have been incurred if your deception had not been detected and constitute the intended loss and totals $986,845, or more than 400,000 but less than $1 million, for an enhancement of 14 levels.

* * * *

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THE COURT:

Are there any other matters that should be addressed?

MS. MILLER: Judge, if I could just clarify something

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– – and I should have done it sooner.

But according to the PSR, there was a total loss amount -- an actual loss amount of $462,397. And that was based on information that Stuart Chanen, the original prosecutor in this case, provided.

In my calculations I was not able to reach that same amount. Based on the documents that I provided to you earlier, I came up with a total actual loss of $434,617. It does not in any way affect the range in terms of the enhancement for loss amount, but it would impact the restitution that --

THE COURT: What was the amount that you found?

MS. MILLER: I found $434,617.30.

THE COURT: And did you discuss that with Ms. Hepner?

MR. HANDELSMAN: I appreciate Ms. Miller's --

MS. MILLER: Yes, and it was set forth in our response as well.

THE COURT: Okay. So the Court will change the restitution figure then to that amount, $434,617.30.

* * * *

Table 15

OFFENDERS RECEIVING FINES AND RESTITUTION IN EACH PRIMARY OFFENSE CATEGORY[1]
Fiscal Year 2007

PRIMARY OFFENSE	TOTAL	NO FINE OR RESTITUTION ORDERED		RESTITUTION ORDERED/NO FINE		FINE ORDERED/ NO RESTITUTION		BOTH FINE & RESTITUTION ORDERED		AMOUNT OF PAYMENT ORDERED[2]			
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Total	Mean	Median	Sum
TOTAL	72,500	54,158	74.7	9,406	13.0	7,975	11.0	951	1.3	18,125	572,058	5,000	10,368,543,144
Murder	80	45	56.3	29	36.3	5	6.3	1	1.3	34	7,945	5,164	270,277
Manslaughter	65	24	36.9	37	56.9	3	4.6	1	1.5	40	5,164	3,582	206,575
Kidnapping/Hostage Taking	47	35	74.5	8	17.0	4	8.5	0	0.0	12	9,936	5,928	108,435
Sexual Abuse	381	291	76.4	33	8.7	55	14.4	0	0.0	88	23,104	2,000	2,032,313
Assault	575	384	66.8	103	17.9	80	13.9	8	1.4	190	7,597	1,286	1,443,507
Robbery	1,117	726	65.0	342	30.6	30	2.7	9	1.7	891	22,268	4,541	19,841,225
Arson	78	36	46.2	33	42.3	3	3.8	3	3.8	39	1,143,898	122,498	67,489,994
Drugs - Trafficking	24,261	21,495	88.6	371	1.5	2,339	9.6	56	0.2	2,707	13,874	1,500	37,555,824
Drugs - Communication Facility	373	319	85.5	6	1.6	48	12.9	0	0.0	51	2,736	1,250	139,519
Drugs - Simple Possession	656	249	38.0	6	0.9	393	59.9	8	1.2	407	1,114	1,000	453,266
Firearms	8,335	6,794	81.5	572	6.9	941	11.3	28	0.3	1,508	34,265	2,000	51,671,902
Burglary/B&E	39	12	30.8	26	66.7	1	2.6	0	0.0	27	6,535	1,476	176,458
Auto Theft	63	20	31.7	33	52.4	8	12.7	2	3.2	43	45,142	3,750	1,941,120
Larceny	1,754	382	21.7	903	51.5	331	18.9	140	8.0	1,375	117,313	6,000	160,718,137
Fraud	7,726	2,308	29.9	4,371	56.6	687	8.9	360	4.7	5,316	1,621,654	43,177	8,734,220,702
Embezzlement	465	53	11.4	335	72.0	34	7.3	43	9.2	410	121,136	16,810	49,666,093
Forgery/Counterfeiting	1,154	416	36.0	595	51.6	95	8.2	49	4.2	734	51,344	3,258	37,686,725
Bribery	243	85	35.0	42	17.3	65	26.1	21	8.6	157	280,120	11,000	43,978,858
Tax	645	212	32.9	185	28.7	193	29.9	55	8.5	420	315,496	30,451	132,508,376
Money Laundering	913	580	63.5	139	15.4	156	17.1	18	2.0	326	2,433,926	50,000	793,456,744
Racketeering/Extortion	617	377	61.1	117	19.0	104	16.9	19	3.1	237	359,612	7,500	85,226,072
Gambling/Lottery	113	51	45.1	3	2.7	58	51.3	1	0.9	59	5,371	2,000	316,895
Civil Rights	64	27	42.2	24	37.5	12	18.8	1	1.6	36	595,953	3,500	21,454,223
Immigration	17,525	17,010	97.1	48	0.3	462	2.6	5	0.0	487	6,512	1,000	3,171,289
Pornography/Prostitution	1,440	1,142	79.3	33	2.3	261	18.1	4	0.3	295	13,787	3,000	4,239,626
Prison Offenses	316	285	90.2	3	0.9	25	8.2	2	0.6	30	3,010	1,000	90,301
Administration of Justice Offenses	1,812	692	68.4	101	10.0	210	20.8	9	0.9	307	129,331	4,000	39,704,250
Environmental/Wildlife	192	38	19.8	21	10.9	104	54.2	29	15.1	154	4,369	5,000	2,210,304
National Defense	31	16	51.6	1	3.2	14	45.2	0	0.0	15	14,506	5,000	217,637
Antitrust	15	2	13.3	2	13.3	11	73.3	0	0.0	3	115,691	50,000	1,503,966
Food & Drug	71	17	23.9	10	14.1	37	52.1	7	9.9	54	220,355	5,000	11,899,155
Other Miscellaneous Offenses	2,134	555	25.9	956	44.8	1,075	50.4	62	2.9	1,580	39,966	500	62,846,229

[1] Of the 72,865 cases, 365 were excluded due to one or both of the following reasons: missing primary offense category (100) or missing information on type of economic sanction for cases in which offenders were made. (356). The total number of cases used to calculate amounts of payment ordered (18,125) is less than the total number of cases receiving fines and/or restitution (18,740) due to the exclusion of cases for which a fine and/or restitution was ordered, but the amount was not specified. Fine information includes criminal fines and/or the cost of incarceration. Descriptions of variables used in this table are provided in Appendix A.

[2] In cases of joint and several restitution, the full amount of restitution is attributed to each offender which may result in overcounting of the total amount of restitution reported for all offenders.

SOURCE: U.S. Sentencing Commission, 2007 Datafile, USSCFY07.